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No. ____

In The

Supreme Court of The United States

OCTOBER TERM, 1980

OHIO DEPARTMENT OF HIGHWAY SAFETY,
and DONALD D. COOK, Director,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the United States Environmental Protection Agency can, under the Commerce Power, validly order the Ohio Highway Safety Department and its Director, to enforce the pollution control plan promulgated by the United States EPA, rather than enforcing the plan itself, when any air pollution does not come from a state facility, but from vehicles owned by private individuals.

2. Does the pollution control plan of the EPA for the Cincinnati area violate the Fifth Amendment by denying equal protection of the law, because those driving vehicles in that area who are the class alleged to cause air pollution, are restricted if their vehicles are registered in Ohio, but not if registered in Kentucky or Indiana, thus classifying on a basis unrelated to the objective of the plan.

3. Does the EPA order violate Article IV, Section 4 of the Constitution because petitioners have no legal right under Ohio law to comply with the order to revoke license plates for spark ignition vehicles.

4. When the EPA writes a pollution control plan ordering a city and county to control car exhaust fumes, is it a violation of the Fifth Amendment for the EPA to order a state official to enforce it after the time for appeal has passed, when the language does not clearly include the state officer at all, heavy criminal penalties can be imposed for failure to carry out the order, and state law does not allow such acts by the officer.

PARTIES

The plaintiff in the United States District Court was the United States, specifically the Environmental Protection Agency. The defendants were Donald Cook, Director of the Ohio Department of Highway Safety, and the Department itself. Mr. Cook was replaced by Robert Chiaramonte while the case was pending in the trial court. He was replaced in 1979 by Earl Reich, the present director.

The United States is the respondent, and is sometimes referred to as the "EPA". Petitioners are alternatively referred to as the "State" or "Ohio".

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported and is reproduced in Appendix A. The decision of the United States District Court for the Southern District of Ohio is not reported and is reprinted in Appendix B.

The decision of the Court of Appeals was filed on December 5, 1980, and a Motion for Stay of Mandate was filed with it on December 24, 1980.

The decision of the Court of Appeals reversed the District Court's decision denying enforcement of an air pollution control plan against petitioners, and it is this reversal by the Court of Appeals in a two to one decision that petitioners are requesting this Court to reverse.

GROUNDS FOR JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE REGULATIONS

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3
Article III
Article IV, Section 4
Fifth Amendment
Tenth Amendment

STATUTES

5 U.S.C. §703
28 U.S.C. §1254
28 U.S.C. §1345
42 U.S.C. §7401-7642
Ohio Revised Code §3704.14

REGULATIONS

38 Fed. Reg. Part 52, pp. 309712-309714
40 C.F.R. §52.1870-52.1884
40 C.F.R. §52.1878
40 C.F.R. §52.1879

These regulations and sections 110-113 of the Clean Air Act (42 U.S.C. §§7410-7413) are reprinted in Appendix C. The basic statute involved is the Clean Air Act as amended through 1974. It was codified in 42 U.S.C. 1857 and was renumbered in 1977 as 42 U.S.C. 7401 thru 7642. A cross-reference from the old sections to the new is included in Appendix C. Also included is O.R.C. 3704.14.

STATEMENT OF THE CASE

Under 42 U.S.C. §7401 et seq. (see §7410), the states are to set up pollution control plans and submit them to the United States Environmental Protection Agency, and the EPA may, if it finds the plan or part of it to be inadequate, set up its own plan. In 1973 Ohio submitted its plan which was approved except for Cincinnati and the surrounding County of Hamilton. Pursuant to this authority the EPA set up its own plan for the metropolitan Cincinnati air quality control region (App. pg. A-37, 56). The state plan for Cincinnati was found to be marginally inadequate (App. pg. A-41). The Cincinnati air quality control region covers 3,000 square miles in southwestern Ohio and adjacent areas of Indiana and Kentucky (App. pg. A-41). In 38 Federal Register, part 52 at page 30973 the EPA said that the State of Ohio should assure maintenance of motor vehicles registered in Hamilton County by requiring annual inspections (App. pg. A-46).

No appeal was taken to the Sixth Circuit under 42 U.S.C. §1857h-5 within thirty days (now sixty days under 42 U.S.C. 7607) to protest the plan as being arbitrary or capricious.

The substitute plan of the EPA provided in Section 52.1878 that Cincinnati and Hamilton County were required to establish, administer, and enforce the inspection program to carry out this objective (App. pg. A-56). The EPA wanted Ohio to refuse to issue license plates to cars which inspection showed did not meet EPA standards. Ohio officials declined to do this. On March 15, 1976 the EPA issued a notice of violation to Donald Cook of the Ohio Department of Highway Safety, the Ohio agency which licenses autos on an annual basis. On June 22, 1976 an EPA order was

issued to the Department of Highway Safety ordering it to refuse to license cars which had not passed an inspection test, and whose owners reside in Cincinnati or Hamilton County.

The notice of violation dated March 15, 1976 and the order dated June 22, 1976 stated that Highway Safety was allowing registration of cars and was thus violating the plan requiring Cincinnati to inspect cars. The order of June 22, 1976 directed to Mr. Cook of the Highway Safety Department ordered him to refuse to issue license plates to cars until the vehicle had been inspected.

The Director of Highway Safety declined to carry out this order because he had no legal authority to do so under state law. To enforce this order the United States filed a complaint in the Federal District Court on November 18, 1976, and the Ohio Department of Highway Safety and Donald Cook filed an answer on December 14, 1976. Jurisdiction was based on 28 U.S.C. §1345, and §113(b) of the Clean Air Act (42 U.S.C. §7413(b).

A motion for summary judgment was filed by the United States. An affidavit filed with the motion alleged that the inspection and maintenance program was in effect and was being enforced by Cincinnati. The District Court issued a decision on October 14, 1977 denying the motion for summary judgment and deciding that that EPA order was not enforceable, and entered final judgment for the defendants on February 23, 1978. A notice of appeal was filed by the United States and a cross-appeal was filed by the Ohio Department of Highway Safety.

The cross-appeal preserved the issue of whether the pollution control plan, which carries criminal penalties,

is clearly enough applicable to Ohio at all to be enforceable in the courts, or whether it is too vague in its reference to the State.

The United States moved to dismiss the cross-appeal, and the Court denied the motion by an order filed on November 3, 1978.

After the oral argument in the Court of Appeals a question was raised as to whether new Ohio legislation (R.C. 3704.14 — see App. pg. A-122) made the appeal moot. The legislation sets up a board to make a study of the need for an inspection and maintenance program. Whether anything will come of this is a matter for speculation for the future since no action is final before the end of 1982, and the Court of Appeals ruled that this did not address the issues before the Court and therefore the appeal was not moot. Petitioners do not appeal from this decision.

On December 5, 1980 the Court of Appeals for the Sixth Circuit issued its decision reversing the District Court and denying the cross-appeal in a two to one decision, with a strong dissenting opinion.

This petition now seeks reversal of the Court of Appeals decision.

REASONS FOR GRANTING THE WRIT

I. THE COMMERCE POWER DOES NOT ALLOW THIS USURPATION OF STATE GOVERNMENT AND ITS POLICE POWER.

A. The District Court Had Jurisdiction To Hear All Defenses In Deciding This Case.

The District Court ruled that it had power to decide whether the Administrator acted under statutory authority in spite of the thirty day time limit on challenges to his actions in former 42 U.S.C. §1857h-5(b), now sixty days under 42 U.S.C. §7607. The Court held that it could do this under its equitable powers. This is in accord with the traditional equitable power of the Court. *Federal Power Commission v. Arizona Edison Co.*, 194 F.2d 679, 685 (9th Cir. 1952).

If the time limit does prevent asserting any defenses such as those raised here, then the statute is unconstitutional because it violates Article III. The reason is found in the separation of powers doctrine. Where Congress has established courts it may not deprive them of their inherent power:

> ". . . whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it." *Yakus v. United States*, 321 U.S. 414, 468, (1944), Justice Rutledge dissenting.

In *Bowles v. Willingham*, 321 U.S. 503, 526 (1944), Justice Rutledge, concurring, said that where civil rather than criminal enforcement is provided for, a restricted period for challenge may be sustained but not if the regulation is invalid on its face. So if the

statute here, imposing civil and criminal penalties, does grant authority to order Highway Safety to revoke licenses, it is invalid on its face for the reasons set forth in this brief and must be struck down.

Chief Justice Hughes wrote:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function. . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal Court should determine such an issue upon its own record and the facts elicited before it." *Crowell v. Benson*, 285 U.S. 22, 60, 64 (1932).

Therefore this Court should hold 42 U.S.C. §1857h-5 (b) (1) and (2) (now 42 U.S.C. §7607 (b) (1) and (2) unconstitutional for violation of Article III of the Constitution and thus denying due process to the Director of Highway Safety.

B. The State Is Not A Person Violating The Clean Air Act, And The Commerce Power Does Not Allow The EPA To Order The State To Enforce The EPA Plan.

In *Brown v. Environmental Protection Agency*, 566 F.2d 665 (9th Cir. 1977) (Brown II) the Court said that in *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975) (Brown I) that Circuit had held that neither §113(a) (1) nor §113(a) (2) of the Clean Air Act (42 U.S.C. §1857(c)-8(a) (1) and (2), which is now 42 U.S.C. §7413), authorized the EPA to impose sanctions against the state for failing to

comply with orders on reducing exhaust fumes from autos. The Court then said that having the case before it again on remand from this Court, *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977), it was again stating that the above noted ruling was still the law of the Ninth Circuit except as modified in *Brown II*. That aspect of its opinion was not modified, and in fact the Court went much farther and at page 673 it said that while it was proper to have the state deny registration if a federal certificate of compliance was not obtained by a car owner, that it was not proper for the EPA to order the state to impose an inspection system and deny registration because the car owner could not get a state certificate. The Ninth Circuit said the former procedure fell within the powers of Congress but the latter did not. This is precisely the case which we are now petitioning this Court to grant a writ of certiorari for. Here a state inspection program has been imposed by the EPA, and the Court has upheld it, but reversing the District Court's decision in a two to one opinion.

The Sixth Circuit recognized that Congress had not made this explicit in the statute, but it interpreted the law to allow this to be done. The Ninth Circuit said in *Brown I* that it should not be implied that this would be the intent of Congress in view of the delicate nature of federal-state relations unless Congress had made it explicit. Therefore we most strongly urge the Court to grant the petition for the writ of certiorari and to reverse the Sixth Circuit on this point.

The Court of Appeals for the Sixth Circuit has decided this point precisely contrary to the Ninth Circuit, and has failed to follow the decision of the Court of Appeals for the District of Columbia Circuit in *Dis-*

trict of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975) where the Court said at page 991 at the bottom of the second column that a State could comply with the registration prohibition by making it necessary for vehicle owners to produce a certificate of compliance obtained from federal officials but beyond that they could not order the State to enforce the federal regulatory scheme.

Therefore this decision of the Sixth Circuit Court of Appeals is in direct conflict with the decisions of the Ninth Circuit and the District of Columbia Circuit and this Petition for Certiorari should be granted and this conflict resolved by this Court, because this Court has never ruled on the point at issue.

The decision of the Court of Appeals for the Sixth Circuit discussed this Court's decision in *National League of Cities v. Usery*, 427 U.S. 833 (1976) in deciding why upholding this action against the State did not violate the Constitution. The Court said (App. A-20) that the EPA does not seek to revamp Ohio vehicle licensing or the Ohio system of operating its streets and highways. The Court had already reached the conclusion that the state is not polluting the air because it owns the streets and highways; it therefore was accepting the argument of petitioners that the state is not "operating" anything by owning the streets, but that it is persons who drive vehicles on them who are operating the pollution causing device. Thus the opinion is not consistent on its own terms. Furthermore, the Court said that the plan would not require the state to adopt legislation, when as pointed out in this argument below,the record conclusively establishes as a matter of law for this litigation that the state would in fact have to do just that. The Court then said

requiring denial of registration would not impair the integrity of the state and hence the Tenth Amendment would not be violated. The Court did not discuss the fact that the only Court of Appeals which has upheld such interference with state government under the Clean Air Act was the Third Circuit in *Pennsylvania v. EPA*, 500 F.2d 246 (3rd Cir. 1974) where the Court relied explicitly on the decision of this Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968). The Sixth Circuit does not discuss at all the fact that this Court specifically overruled *Maryland v. Wirtz* in *National League of Cities*, and therefore the only judicial expression on this point which is in accord with the present opinion has been overruled. In addition the Sixth Circuit specifically quotes the concurring opinion of Mr. Justice Blackmun in the *National League of Cities* where he wrote in 426 U.S. at 856:

> "In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

It seems to petitioners that what this language means is what other Courts of Appeals have said, namely that where state facilities such as automobiles, or power houses, are being operated by the State they must comply with United States pollution control standards. There would be some interference with the integrity of state government by making it comply with the na-

tional standard on these points, but this is necessary and is well within the federal-state relations of our national system. There is no basis in this language, or in *National League of Cities* itself, for saying that the federal agency may order the State to simply carry out the orders of the federal agency and thereby become a police officer for the federal government. No court so far as our research can discover has ever issued such a decision, nor has this Court ever approved it.

The proper method of administering this plan is for the federal agency to enforce its own plan by its agents, and then if a car owner cannot produce a federal certificate of compliance, then the car owner should be ordered by the State to stop driving in order to comply with federal law. In that instance if the State should refuse to enforce the federal law and not cancel the registration, then the federal law could be enforced either in federal court or in the state courts themselves. The state courts must enforce federal law in such a case. *Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130 (1876). This is the constitutional method of administering the Clean Air Act, whereas the decision of the Court of Appeals here makes a state official a puppet of a federal agency and requires him to act without reference to the State as a unit of government in our federal system. This is in fact the destruction of the states as sovereign political entities which this Court said "the inherent limitations in the Commerce clause give it power to prevent." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).

The opinion in this case also discusses the legislative history of the Clean Air Act. When the amendments of

1970 were passed there was no discussion of the constitutionality of the statutes. The Court relies on comments made when Congress was considering the 1977 amendments and quotes a lengthy section of comments from a committee. None of the committee comments support the decision of the Sixth Circuit in this case. One comment of the committee explicitly states that the committee agrees with the decision of the Court of Appeals in *District of Columbia v. Train* on the prohibition of state registration of a noncomplying motor vehicle. This decision said that the state could be ordered to do something if there were no *federal* certificate of compliance, and also said that a state inspection and registration ban could not be imposed by the EPA. Thus the legislative history does not support the Sixth Circuit's decision except insofar as the comments of Senator Muskie reprinted in the Congressional Record S9168 (June 8, 1977) can support it.[1] Senator Muskie said that the EPA's authority to promulgate control measures requiring the states to take action and to compel compliance with them is clear in the existing sections of the Clean Air Act even if this is a delicate area of federal-state relations. As to Senator Muskie's comments however we urge the Court to adopt the view of the Ninth Circuit in *Brown II*, 566 F.2d at page 671, where the Court said that they were more impressed by what Congress did not do in the 1977 amendments than by what Senator Muskie believed was done in passing the legislation in 1970. The Court said since Congress had not changed the law after the previous decisions of Courts of Appeals, in-

[1] For legislative history and Sen. Muskie's comments see Opinion, App. A pp. A-14 et seq.

cluding the Ninth Circuit's decision that merely building and owning roads and highways did not make the state a source of pollution, that Congress had not meant that owning the roads was itself a cause of pollution. We submit that if building the roads and owning them, and governing them under the state police power, does not make the state a polluting person, then ipso facto, failing to enforce the federal EPA plan could not in itself make the state a pollution causing person. It is very simple, the persons driving the cars are causing the pollution and are the ones to be restricted by the federal EPA where it has promulgated a plan and the state plan has been superseded. The order of the EPA, which has been upheld by the Court of Appeals in this case, is a violation of the Tenth Amendment and is not authorized by the Clean Air Act itself or the Commerce Power under Article I, Section 8, Clause 3, and this Court should therefore grant the petition for a writ of certiorari and reverse this decision of Sixth Circuit.

II. THE EPA PLAN FOR THE CINCINNATI AREA IS A DENIAL OF EQUAL PROTECTION AND IS UNCONSTITUTIONAL.

The Environmental Protection Agency has ordered that motor vehicles owned and operated in Cincinnati and Hamilton County be denied license plates for causing air pollution. This administrative act is a denial of equal protection to these citizens, because of the way the law passed by Congress is applied to them. The objective is to clean up the air in Hamilton County, and the means selected to accomplish this result is to reduce air pollution from automobile exhausts because it has

apparently been determined that auto fumes are a hazard. The class thus excludes diesel trucks, diesel buses, and any other type of engine such as jet engines or other types. The class also excludes airplanes and riverboat engines and all industrial stationary pollution sources.

If it is determined that fumes from motor vehicles are a hazard which requires action against them regardless of all other pollution producing sources, then this is a proper legislative classification. But within this classification all persons must be treated equally in order for it to be concluded that the class is reasonable for the purpose aimed at, is based on justifiable distinctions for that purpose, and is not clearly arbitrary. Although the right to equal protection does not deny the power to treat different classes of persons in different ways, it does mean that it is forbidden that different treatment be accorded to persons placed into different classes on the basis of criteria wholly unrelated to the objective of the statute. *Johnson v. Robison*, 415 U.S. 361 (1974). This Court has held that a classification invalid under the Equal Protection clause of the Fourteenth Amendment is a violation of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, (1954); *Johnson v. Robison*, supra, n. 4.

Applying these principles to this case we find that only those persons owning cars in Cincinnati and Hamilton County are placed within the class. The class thus excludes all those from outside the city and county who work there and regularly drive their motor vehicles there every day, not to speak of those who visit or pass through on trips. It is obvious that the class thus discriminates by covering only part of the people who con-

tribute to the pollution and who should be considered within the objective to be achieved. Someone who lives in Cincinnati and owns a car there may take a bus or walk to work and thus contribute little or nothing to automobile exhaust fumes, while someone who lives in Kentucky, just across the river, and drives into the city would contribute a great deal to motor vehicle exhaust pollution every day. Yet the class excludes the latter without any reasonable basis considering the purpose of the law. This is not a case of economic regulation on a local level where legislative action is given deference by the courts, but involves Federal-State relations of great importance. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Therefore, the agency's actions here are a denial of equal protection and a violation of the Fifth Amendment.

III. THE ENVIRONMENTAL PROTECTION AGENCY'S ORDER VIOLATES ARTICLE IV, SECTION 4 BECAUSE THE STATE WOULD HAVE TO ENACT LEGISLATION TO AUTHORIZE REVOCATION OF LICENSES FOR SUCH PURPOSE.

To comply with the EPA orders in this case would mean that the state would have to pass a law giving the defendant legal authority to revoke license plates from motorists in Cincinnati. The defendant has no power to do this at the present time. An affidavit of George S. Jupinko, Esq., legal counsel to the Highway Safety Department attesting to this fact was filed in the District Court. The Court of Appeals opinion states that Ohio would not be required to adopt any legislation

to revoke licenses. See App. A p. A-20). But the affidavit referred to was submitted to the District Judge in answer to the Motion for Summary Judgment, and it was never disputed or rebutted in any way; therefore it is admitted as true, and the Sixth Circuit opinion is wrong.

In *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), the Court said at page 225 that while some attributes of state sovereignty have been reduced, if there is any attribute of sovereignty left to the states it is their right in their legislatures to pass, or not to pass, laws. The Court cited *In re Duncan*, 139 U.S. 449, (1891), where it is said at page 461 that:

> ". . . A republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies. . ."

The Fourth Circuit further held that the Clean Air Act authorizes the EPA to prepare regulations for a state, but it does not empower it to direct a state to enact such statutes as it prescribes. This Court has said that it has repeatedly recognized that the sovereignty attached to the state governments has attributes which may not be impaired by Congress because the Constitution prohibits it. An example is the right to locate its own seat of government and appropriate its own public funds for that purpose. *National League of Cities v. Usery*, supra. The Court relied on *Coyle v. Smith*, 221 U.S. 559 (1911), which voided an act of Congress denying a state the right to locate its own

capitol, on the grounds that this violated Article IV, Section 4, of the Constitution.

In the same way here the attempt of the federal agency to require the state to pass legislation and engage in the exercise of its police powers in inspection of cars, instead of carrying out its responsibilities itself, is a violation of Article IV, Section 4, of the Constitution.

IV. BECAUSE THIS POLLUTION CONTROL PLAN CAN IMPOSE CRIMINAL PENALTIES, IT WAS ERROR FOR THE COURT TO CONSTRUE ITS TERMS TO APPLY TO THE STATE.

A. The Language Of The Plan Does Not Order Any Action By The State Of Ohio, Only By The City And County.

The Cincinnati area plan (App. p. A-58) states in 40 C.F.R. 52.1878(e):

> "(e) After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and procedures, as defined in paragraph (d) (2) of this section."

In the complaint filed in the District Court the United States quoted this section but inserted the word "and" between the word "Cincinnati" and the phrase

"the State of Ohio", in line 3 of this section. In the Motion for Summary Judgment below, they have inserted the word "or" in the same place, because without such a connective word this plan does not apply to the State. The United States has supplied words which would have shown a clear intent to make the state, as well as the city and county, subject to the plan.

Section 52.1878 states that it applies in Hamilton County. All of the sections state that the city and county should do various things. An example is subsection (g) which requires them to submit to the EPA a compliance schedule, and in subsection (3) under (g) to find the money to do it. All of these things show that it is the city and the county that the plan is directed toward.

In Section 52.1879 the EPA ordered the Director of the Ohio Environmental Protection Agency to take certain action regarding stationary sources of pollution. This shows plainly that when the EPA wanted to involve an agency of the state government of Ohio they knew exactly how to do it and no one needs to insert words to show that this was what they meant.

Several years after this plan was promulgated, Respondent seeks for the first time to involve the state and the Director of Highway Safety in it and does so under a statutory provision allowing for fines and imprisonment. We submit that the Court should not allow this ex post facto action.

Since petitioners were not included in the plan as promulgated and were not affected by it, the thirty-day time limit does not apply here and petitioners are entitled to raise all possible defenses. As the Court said in *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F. 2d 162, 173 (6th Cir. 1973) cert. den.

425 U.S. 934 (1976), where there was not an adequate hearing, all claims can be asserted as a defense in federal or state enforcement proceedings under 5 U.S.C. §703. This section provides:

> "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

The Court held that this applies in the face of the thirty-day review period. Since here there was no adequate prior opportunity for review, defendants are entitled to assert all defenses.

B. Criminal Penalties Require Precise Regulations.

The statute imposes criminal penalties of $25,000 a day fines and a year in prison for violation of an order of the EPA. 42 U.S.C. §1857c-8(c)(1) (now §7413). The Administrator has issued an order to the state and the Director of Highway Safety and thus they are subject to those criminal penalties if the regulation applies to them. Administrative regulations, especially those bearing criminal penalties, are subject to the same requirements of definiteness as statutes are. *M. Kraus & Bros. v. United States*, 327 U.S. 614 (1946); *Sentner v. Colarelli*, 145 F. Supp. 569, 578 (E.D. Mo. 1956), aff'd., *Barton v. Sentner*, 353 U.S. 963 (1957). In *Diamond Roofing v. Occupational S. & H. Rev. Commission*, 528 F. 2d 645 (5th Cir. 1976) at page 649 the Court held that where violation of a regulation imposes criminal or civil penalties, regulations cannot be interpreted to mean what the agency intended to

say, but did not adequately express. *Meehan v. Macy*, 392 F. 2d 882 (D.C. Cir. 1968); *Cole v. Young*, 351 U.S. 536 (1956).

In *Cole* the Court held that ambiguities should be resolved against the government where it was the government that wrote the order and failed to explicitly state what it meant to say.

C. Administrative Interpretation Is Not Deferred To Where Criminal Penalties Are Imposed.

In *U.S. v. Rust Communications Group*, 425 F. Supp. 1029 (E.D. Va. 1976) it was held that ordinarily the administrative agency's interpretation is given great deference, but this does not apply if there is a criminal penalty, citing *M. Kraus & Bros. v. U.S.*, and *Boyce Motor Lines v. U.S.*, 342 U.S. 337 (1950). In *Kraus* this Court said, 327 U.S. 614, 621, that administrative rules defining who suffers the criminal penalties contained in a statute passed by Congress, are subject to the same strict rules of construction as criminal statutes are. Further this Court said on the next page that "Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language." The Administrator's interpretation had been consistent but this Court rejected it.

This Court also noted that in other regulations involved in *Kraus* more precise language was used. The District Court here found that it was open to doubt whether Ohio was included, and noted that other regulations were more precise, but then ruled that Ohio was included if the regulation was read fairly. The Court of Appeals affirmed.

The opposite result should be reached. The Court based its finding on the fact that Cincinnati is not the one who registers cars so the regulations must have meant Ohio since only it has the legal power to do this. But this Court said that uncertainty cannot be cured by supplying what the administrative agency omitted, that where criminal penalties apply precision is required, and that an interpretation should be based on the inexorable command of relevant language. That standard is not met here and the cross-appeal should be sustained.

The basis for judicial deference to an administrative agency's interpretation of its regulation is usually the expertise of the agency in its own area. *Perine v. William Norton & Co.*, 509 F. 2d 114 (2d Cir. 1974). Here no expertise is involved in interpreting the language. The usual rule that the specific controls the general applies to administrative law. In *Spreckels v. Helvering*, 315 U.S. 626 (1942), it was held that a general regulation defining items included in a program is not controlling when a specific regulation excludes some items in the general class. Here Ohio is generally included in a preamble, but the specific plan for the Cincinnati area does not include it and therefore Ohio is not a party to this plan. As in *Cole v. Young*, 351 U.S. 536 (1956), failure of the government to state explicitly what was meant is the government's fault and ambiguity should be resolved against it. Because the regulation does not clearly apply to the state and the Director, it was error for the Court to rule that it does.

The District Court held that since only the state can revoke license plates the plan should be construed to include it and the Court of Appeals affirmed. But

Cincinnati has an inspection program and it is being enforced. Since the United States says that the rejected Ohio plan was only marginally inadequate, and then imposed the inspection plan which is being enforced by the city, revocation of license plates is not required to attack pollution. In any event the plan provides two methods of enforcement. After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio, shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle.

For the Court to say that since registration is done by the state, the state must be deemed included, is to ignore the fact that enforcement by the city is occurring. Under these circumstances the Court in striving to interpret the regulation, has by-passed the enforcement of the city, and supplies words that the agency did not include. It has rewritten the regulation to cure the defect.

The Court of Appeals says that since this enforcement action is civil, not criminal, very strict construction is not required. This begs the question, since petitioners are now bound by the interpretation and could not raise the defense in a subsequent criminal proceeding, because the judicial ruling on the meaning of the language would be res judicata between these parties.

Thus, the reasons advanced by the District Court for including Ohio are not correct. The regulation is too ambiguous to sustain criminal penalties and controls are being enforced.

Therefore the cross-appeal should be sustained and the portion of the District Court's decision applying regulation 40 C.F.R. 52.1878(e) to Ohio should be

reversed and final judgment entered for cross-appellants.

CONCLUSION

The Court of Appeals for the Sixth Circuit has decided that it is constitutional for a United States District Court to issue an injunction against a state government ordering it to enforce a pollution control plan promulgated by the United States Environmental Protection Agency, rather than the EPA proceeding to enforce the pollution control plan itself when the state fails to do so. The Court finds that when the state refuses to enforce the EPA plan that the state is then itself a person violating the implementation plan and thus subject to the enforcement procedures authorized by Congress to be taken against persons violating pollution control plans. No other Court of Appeals has made this kind of a decision interpreting the Clean Air Act and other Courts of Appeals have specifically ruled that the EPA has no such authority and therefore the Courts should not issue such an injunction. There is thus a direct conflict between this decision of the Court of Appeals for the Sixth Circuit and the decisions of the Court of Appeals for the Fourth Circuit and the Ninth Circuit. The Court in upholding the order to the state to ban registration of the cars not meeting the EPA exhaust fume standards, also relies on the decision of the Court of Appeals for the District of Columbia Circuit, which it interprets as upholding the inspection and maintenance regulations including a registration ban. The decision of the District of Columbia Circuit however does not uphold such a ban unless the vehicle owner was unable to produce a federal certificate of compliance, so the Court of Ap-

peals for the Sixth Circuit differs sharply from the decision of the District of Columbia Circuit on this point. The D. C. Circuit specifically held that the EPA could not compel a state to become involved in administering the regulatory scheme promulgated by the Administrator, and there is a specific conflict here as well.

The Court purported to follow this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), but the Court specifically ruled that there was no state facility involved here, and therefore the Court has expanded on this Court's rulings on limitations of the commerce power and has done so without a proper basis.

The pollution control plan promulgated by the EPA is invalid on its face as a denial of equal protection. Cars registered in Ohio are controlled but cars which are registered in Kentucky and Indiana within the same air quality control region are not, even when they drive in Cincinnati and contribute to air pollution. Thus the plan discriminates between people who drive cars in Cincinnati without any rational basis considering the objectives of the plan and is a denial of equal protection.

The plan itself is directed entirely towards the City and the County and details several things that they are required to do to control exhaust fumes from spark ignition vehicles. More than two years after expiration of the time for appeal to the United States Court of Appeals concerning the terms of the plan, the EPA suddenly interprets the plan to require the State of Ohio to do something. It is submitted that since the statute provides heavy criminal penalties of twenty-five thousand dollars a day fines and up to a year in

prison as punishment, that the EPA cannot interpret the plan this way without clear language making it applicable to the petitioners. There is no such language in the plan and therefore this decision is a denial of due process and a violation of the Fifth Amendment.

The Court says (see App. pg. A-18) that to proceed by displacing the state as regulator of motor vehicles during a "period of federally assumed enforcement", would be a more drastic remedy than the one chosen by the EPA. But the Fourth Circuit said in 530 F.2d at 227 that administrative expediency is not a reason for violating constitutional principles, and whether or not many federal employees go into a state to enforce a law is beside the point.

This decision upholds a violation of the Constitution and should be reversed.

Respectfully submitted,
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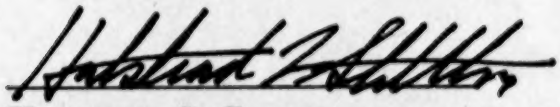

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January 30, 1980

APPENDIX

APPENDIX A

No. 78-3306
No. 78-3307
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
Cross-Appellee,

v.

OHIO DEPARTMENT OF HIGHWAY SAFETY AND DONALD D. COOK, DIRECTOR
Defendants-Appellees,
Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Decided and Filed December 5, 1980.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. WEICK, Circuit Judge, (pp. 21-23) filed a separate dissenting opinion.

LIVELY, Circuit Judge. This case arises under the Clean Air Act, as amended, (the Act) 42 U.S.C. § 7401, *et seq.*[1] The issue on appeal concerns the en-

[1] The Clean Air Act was first enacted in 1955 and there have been frequent amendments, most notably in 1970 and 1977. At the time this litigation began the Act was codified at 42 U.S.C. § 1857, *et seq.* The 1977 amendments rearranged many provisions of the Act and recodified it at 42 U.S.C. § 7401, *et seq.*

forcement powers of the United States Environmental Protection Agency (EPA) against a state which fails to perform an act required of it by a provision of an implementation plan promulgated by EPA. The specific question to be decided is whether the State of Ohio is subject to the Act's enforcement provisions for its failure to deny registration to vehicles which have not passed inspection and maintenance emission tests required by an EPA-promulgated provision of the state implementation plan.

I.

As required by the Act, the State of Ohio adopted an implementation plan for each air quality control region within the State and several metropolitan interstate regions. Upon finding that the Ohio plan was not adequate to assure attainment and maintenance of the primary standard for photochemical oxidants in the Cincinnati area, EPA denied approval to a portion of the Ohio plan. As permitted by section 110(c) of the Act, 42 U.S.C. § 7410(c), on November 8, 1973, EPA supplemented the state implementation plan by publishing a regulation which required a vehicle inspection and maintenance program for Cincinnati and Hamilton County, Ohio. 40 C.F.R. § 521878.

This regulation provides in part:

> (e) After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and

procedures, as defined in paragraph (d) (2) of this section This shall not apply to the initial registration of new vehicles.

Upon adoption, this regulation became part of the Ohio implementation plan.[2]

Cincinnati and Hamilton County set up inspection facilities which complied with the requirements of the regulation. However, the State of Ohio has refused to withhold registration from vehicles which have not passed emission inspection. After issuing a notice of violation on March 15, 1976 and an order to comply on June 22, 1976, EPA brought this action in the district court pursuant to section 113(a) (1) of the Act, 42 U.S.C. § 7413(a) (1), on November 18, 1976. Section 113(a) (1) (then codified at 42 U.S.C. § 1857c-8 (a) (1)) provides.

§ 1857c-8. Federal enforcement procedures

(a) Determination of violation of applicable implementation plan or standard; notification of violator; issuance of compliance order or initiation of civil action upon failure to correct; effect of compliance order; contents of compliance order.

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding.

[2] Section 52.1878(e) was not challenged by a petition for review. Thus, we treat it as a lawful regulation and are concerned only with the proper interpretation of the regulation, the validity of the order of June 22, 1976, referred to, *infra*, and the power of EPA to enforce it by court action. *See Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 282 (1978).

> If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

The relief sought by EPA was in injunction ordering the Ohio Department of Highway Safety and its director (collectively "the State" or "the State of Ohio") to comply with the June 22nd order.[3]

After considering submissions of the parties and of amici curiae, the district court granted the State's motion to dismiss. In an unpublished memorandum the district court found that section 113 (a) (1) does not provide an enforcement mechanism against a state which fails to comply with the requirements of an implementation plan.

The district court reached its conclusion by considering section 113(a)(2) along with section 113(a)(1). The court determined that the statutory scheme permits an action pursuant to section 113(a)(1) against individual violators of the requirements of a plan but not against a state for failing to enforce the plan. On the other hand, the court found that section 113(a)(2) is the proper vehicle when failure of a state to enforce a plan results in widespread violations. Section 113(a)(2) provides:

> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a

[3] Section 113(b) permits an action for an injunction, or to assess a penalty of not more than $25,000 per day of violation, against violators of state implementation plans.

failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

The district court summarized its holding as follows:

> I am convinced that if the Administrator is confronted with a non-enforcing state, his procedure under this statute is governed by subsection (a)(2) of § 1857c-8 [§ 113], which specifically concerns a case where violations are so widespread that they appear to result from the state's non-enforcement. I do not believe that the Administrator can avoid proceeding under subsection (a)(2) by including specific state enforcement avenues in his § 1857c-5 (c) [§ 110(c)] promulgations and then issuing orders against the state under subsection (a)(1).

II.

A.

EPA contends that highways are treated the same under the Act as state-owned automobiles or power plants. That is, highways are themselves sources of pollution. Thus it argues that the only thing involved in this case "is the State's duty, as owner and operator of its highways, to comply with a valid federal regula-

tion prohibiting registration of automobiles which have not complied with the emission inspection program." Since the State is a "person" within the meaning of the Act,[4] EPA argues that a state which fails to perform a duty imposed upon it by an implementation plan is a person in violation of such plan within the meaning of § 113(a)(1). According to EPA, the district court misunderstood the different roles which section 113(a)(1) and section 113(a)(2) play in the enforcement of implementation plans. EPA argues that section 113(a)(1) is designed for enforcement against individual polluters including the state itself. Section 113(a)(2) offers the alternative of a "period of federally assumed enforcement" where the state has permitted widespread violations by its failure to enforce a plan. The fundamental error of the district court, according to EPA, was its failure to realize "that this regulation [the registration ban contained in 42 C.F.R. § 52.1878(e)] does not invoke the power of the Administrator to force a state to regulate others but rather invokes the power of the Administrator to regulate the State itself."

EPA supports its arguments with references to the legislative history, particularly that pertaining to the 1977 amendments. It maintains that vehicle inspection and maintenance programs are an integral part of the Act which Congress has found to be feasible and productive in the reduction of emissions. EPA points out that vehicle registration has long been used by the State as a means of regulating use of public highways

[4] Section 203(e) of the Act, 42 U.S.C. § 7602(e) provides: "the term 'person' includes an individual corporation, partnership, association, state, municipality . . .," when used in the Act.

as well as raising revenue for their construction and maintenance. Thus, the purpose of the registration ban is to require the State to modify the management of a facility which contributes to pollution. Rather than imposing some far-reaching new or expensive program on the State, contends EPA, the regulation merely requires it to change the manner in which it uses a "proprietary management tool."

B.

The State of Ohio views the matter in a sharply different light. In the first place, the State denies it is an "operator" of highways. It is the builder and owner of the roads, but the only "operation" consists of individuals driving vehicles over them. Thus, any pollution which arises from the State's ownership of the roads is that caused by drivers, and EPA's enforcement efforts should be directed to the pollution-causing act. The State concedes that it could be sued under section 113(a)(1) if it operated vehicles which violated the emission limitations. This is quite different, however, from merely owning highways which attract vehicles whose emissions create air pollution, it contends. Thus, the State argues that section 113(a)(1) is designed to require compliance by persons whose activities cause the pollution, not as a mechanism for requiring the states to enforce an EPA plan. The term "any person" as used in section 113(a)(1) refers to active polluters, not to the mere owners of facilities which at most indirectly cause pollution.

As the State views the statutory scheme, Congress has given the states the first opportunity to enforce implementation plans. If the default of a state consists of failure to enforce a plan, there is no authority for

direct action against the state under section 113(a)(1). Rather, in this situation, EPA is authorized to enforce the requirements of the plan directly against violators during a "period of federally assumed enforcement." 42 U.S.C. § 7413(a)(2).

The State contends that nothing in the Act indicates a Congressional intent to treat the states as violators of implementation plans by reason of their ownership of highways. It disputes EPA's argument that the legislative history, consisting primarily of post-1970 remarks of individual members of Congress, supports its theory. The State maintains that the Act is obviously structured in contemplation of cooperation between state and federal authorities. When this cooperation breaks down, for any reason, EPA is authorized to enforce a plan directly pursuant to section 113(a)(2). However, this is done by displacing the state as enforcer, not by requiring the state to enforce provisions of a plan which were devised by EPA. The State of Ohio asserts that if Congress had intended to authorize direct actions against the states, a departure from traditional state-federal relations, it would have made its intention clear and would not have moved into this sensitive area by indirection.

The State also argues that if the Act should be construed in accordance with EPA's contentions it must be held unconstitutional. The State cites Article IV, Section 4 of the Constitution and the Fifth and Tenth Amendments, and places particular reliance on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

III.

The precise issue in this case — whether EPA may proceed directly against a state to require enforcement

of an EPA-promulgated provision of an implementation plan — appears not to have been treated by any court, at least in its present setting.[5] However, EPA regulations prescribing vehicle inspection and maintenance programs have been the subject of petitions for review by a number of states. The results have not been uniform. In *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) (*Brown I*), the court held that the Act does not authorize sanctions against a state or its officials for failure to regulate pollution-creating activities of others than itself. "Tersely put, the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administration directs." *Id.* at 832. EPA did not contend in *Brown I* that the State of California was a polluter by reason of its ownership of highways. It merely sought to treat the State as a violator for its failure to enforce an implementation plan.

In *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), the District of Columbia, the State of Maryland, the Commonwealth of Virginia and several political subdivisions in the metropolitan Washington area sought review of a regulation establishing a vehicle inspection and maintenance program. After a thorough analysis of the Act, the court concluded that authority to require the states to deny registration to non-complying vehicles had been neither expressly granted nor withheld by Congress.

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[5] *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2d Cir.3, *cert. denied*, 434 U.S. 902 (1977), is distinguishable in several respects. It was a citizen suit rather than an action by EPA. Moreover, the provisions in question had been formulated by the State and City of New York, not by EPA.

> As discussed above, the specific language of the Act suggests that Congress did not confer such authority any more than it intended that the states would be ordered to adopt statutes. On the other hand, nowhere in the Act is the Administrator specifiically told that he lacks authority to force the states to administer the plans he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles. At least in the case of inspection and maintenance programs, it is apparent from the legislative history that Congress did intend that the states would be required to cooperate in administering a federal air quality program.

521 F.2d at 987. Noting the broad authority granted to the Administrator in the formulation of implementation plans, and giving due deference to that official's interpretation of the Act, *Udall* v. *Tallman*, 382 U.S. 1 (1965), the court upheld the inspection and maintenance regulations, including the registration ban.

A similar determination was made in *Commonwealth of Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974). The court's conclusion that EPA is authorized to require a state to enforce EPA's transportation control plan was buttressed by the "great deference" required to be given the agency's interpretation that direct federal enforcement was not the means contemplated by the Act. *Id.* at 257. On the other hand, on petition for review, a set of regulations which directed the State of Maryland to adopt binding regulations and enact legislation to include vehicle inspection and maintenance requirements was held invalid in *State of Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975).

The judgments of the courts of appeals in the cases from California (*Brown I*), the District of Columbia

and the State of Maryland were vacated by the Supreme Court in *EPA* v. *Brown*, 431 U.S. 99 (1977). The action of the Supreme Court was based on EPA's determination not to seek review of the invalidation of certain regulations and its concession that the remaining ones were invalid unless modified. Thus, the Supreme Court did not reach the question now before this court.

In *Brown* v. *EPA*. 566 F.2d 665 (9th Cir. 1977) (*Brown II*), the court consolidated a new petition by the State of California to review revised regulations with the case remanded by the Supreme Court. In *Brown II* the Court adhered to its previous decision that neither section 113(a) (1) nor section 113(a) (2) of the Act authorized sanctions against the State or its officials for failing to comply with transportation control regulations. In support of its revised regulations EPA made the argument upon which it relies in the present case — that the State is itself a polluter by reason of its ownership of streets and highways and that it can be required under section 113(a)(1) to comply with measures designed to reduce pollution caused by emissions from vehicles owned by others and operated on such public ways.

The court in *Brown II* noted that the Clean Air Act contained no mention of "indirect sources" of pollution prior to the 1977 amendments. The 1977 amendments provided for "indirect source review programs" at the election of the states, but denied EPA the right to require such programs.[6] The court reasoned that the "limited" authority granted the Administrator to promulgate indirect source review programs was incon-

[6] 42 U.S.C. § 7410(a) (5) (1976 ed., Supp. I).

sistent with the "expansive indirect source concept" urged by EPA. 566 F.2d at 671. However, *Brown II* was also a review of EPA regulations and the court was not required to determine whether section 113 empowers EPA to proceed directly against a state for failure to comply with a provision of a plan.

IV.

A.

We look first to the language of the Act itself, particularly section 110 (42 U.S.C. § 7410) which deals with state implementation plans. Each state is required to adopt a plan for implementation. maintenance and enforcement of the national primary ambient air quality standard in each air quality control region of the state within nine months after promulgation of the national standard by EPA. 42 U.S.C. § 7410(a)(1). The administrator of EPA is required either to approve or disapprove each plan, or any portion thereof, within four months after the date required for submission. 42 U.S.C. § 7410(a)(2). In order to be approved each state implementation plan must provide, *inter alia*, "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards . . . ." 42 U.S.C. § 7410(a)(2)(G). EPA construes this provision as a more particular statement of the general requirement that each plan include emission limitations and other measures necessary for attaining and maintaining the primary air quality standard, including "transportation controls." 42 U.S.C. § 7410(a)(2)(B).

EPA is authorized to disapprove a state implementation plan if it is determined that the plan fails to

provide for vehicle inspection "to the extent necessary and practicable." Further, EPA is authorized to promulgate a state implementation plan, or portion thereof, upon finding that one adopted by a state is deficient. 42 U.S.C. § 7410(c)(1)(B). However, we find nothing in the language of section 110 which indicates a Congressional intent either to permit EPA to require a state to enforce a portion of an implementation plan promulgated by EPA or to treat a state as a polluter by reason of its ownership of streets and highways.

B.

We next look to the language of section 113, which was added to the Act as part of the 1970 amendments. Pub. L. 91-604, § 4(a), 84 Stat. 1686. This section is captioned "Federal Enforcement." Laws of 91st Cong. 2d Sess., [1970] 1 U.S. Code Cong. & Adm. News at 1966. Read in its entirety this section appears to deal with direct enforcement by EPA. Section 113(a)(1) requires that notice of a finding of a violation be given to "the person in violation of the plan and the State in which the plan applies . . . ." If the violation continues for 30 days, EPA may issue an order or bring a civil action against the violator. The logical interpretation of these provisions is that the notice to the state is designed to give the state an opportunity to bring about an abatement of a violation. If this is not accomplished within 30 days, EPA is authorized to act directly against the violator. Section 113(a)(2) provides identical remedies to EPA when widespread violations have occurred as a result of failure of the state to enforce the plan effectively. Other than including states within the meaning of "any person" there is no

explicit authorization in the Act for EPA to bring a direct action against a state under section 113(a) (1).

C.

EPA argues that the legislative history makes it clear that Congress intended to provide for direct action against states under section 113(a) (1). Section 113 was added to the Act as part of the Clean Air Amendments of 1970. There is little contemporaneous legislative history concerning this section. However, when Congress was considering the 1977 amendments to the Act, there were several references in reports and debate to section 113.

In reporting on a committee proposal, the Committee on Interstate and Foreign Commerce made the following statement:

> This section envisions that the States will undertake to adopt and enforce the inspection and maintenance program.[24] In the event a State to which this section applies fails or refuses to adopt such an I/M system in its plan,[25] then the Administrator would be required to promulgate such a program for the appropriate region(s) in that State under section 110(c) of the Act.

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[24] This does not mean that the I/M system must be State-owned and operated. It may be State licensed, but operated by private service stations or by a turnkey contractor. It may be operated in conjunction with, or separate from, safety inspection and maintenance programs and facilities, although the Committee encourages coordination of safety and emission I/M programs. These are decisions which the State is permitted to make if it adopts and enforces such an I/M program under this section.

[25] The State may, of course, adopt more stringent standards and/or test procedures under section 116 of the Act and these would be approvable by the Administrator.

Once the I/M program has become part of an "applicable implementation plan" (whether by State adoption and EPA approval or by promulgation of the Administrator), then enforcement and implementation can occur in several possible ways. Most preferably, the State may agree voluntarily to implement and enforce the I/M program. Other options include (1) inducing the State to do so, by offering grants under section 210 of the Act or by withholding part of a State program grant under section 105 of the Act or by such other means as have been held permissible by the Court in *District of Columbia* v. *Train;* (2) delegating authority to general purpose local governments to implement and enforce the program under section 303 of the bill; (3) if feasible, providing for Federal implementation and enforcement of the program (including Federal licensing of private I/M centers, or turnkey operations, and imposing Federal inspection fees); or (4) seeking injunctive relief under section 113 of the Act; or (5) a combination of the above. It should be noted that the various mechanisms for obtaining voluntary compliance (*e.g.*, withholding of program grants) are intended to provide alternatives to enforcement actions under section 113, thus allowing the Administrator to avoid compulsion where implementation of the necessary actions can be assured by other means.

In addition, in accordance with the decision of the Court in *District of Columbia* v. *Train*, the Committee has concluded that effective enforcement of this section requires a prohibition on the State registration (including licensing) of any noncomplying motor vehicle.[26] The Committee agreed with that

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[26] Such a prohibition is to be included in each "applicable implementation plan" to which this section applies and may be enforced under section 113 of the Act against the State. The regulations, however, should permit operation of noncomplying vehicles for a reasonable temporary period to permit appropriate repair or adjustment.

Court that such a measure would be constitutionally valid.

H. Rep. No. 95-294, reprinted in [1977] 2 U.S. Code & Cong. Adm. News at 1369-70.

In discussing the Senate version of the 1977 amendments Senator Muskie one of the principal authors of the 1970 amendments, made the following statement:

> In view of the time that has elapsed since enactment of the 1970 amendments, it is regrettable that legal uncertainties have held up implementation of inspection and maintenance programs and other necessary measures. EPA's authority to promulgate transportation control measures requiring the States to take action, where necessary, and to compel compliance with such requirements, where necessary, is clear in sections 110 and 113 of existing law. Although this is a delicate area of Federal-State relations, it is appropriate to require affirmative State action in the field of transportation controls where this proves necessary to protect the public health.
>
> By providing roads and highways that facilitate and encourage extensive use of motor vehicles, the States have played a substantial, if unintentional role in causing the pollution problems that result. And, as a practical matter, State and local governments are in a better position than EPA to attack those problems, which involve millions of motor vehicles, through inspection and maintenance programs and similar measures.
>
> In addition, the scheme contemplated by the act is a reasonable approach to this problem, one that is designed to involve the least possible intrusion into State affairs consistent with the task that is necessary. The 1970 amendments were carefully drawn to provide the States with maximum flexibility and discretion in developing plans under section 110 of the act, so long as the essential objective — attain-

ment and maintenance of the national ambient air quality standards — was met. Thus, the States may make the basic policy choices, if they wish in developing inspection and maintenance programs and simliar measures: Federal promulgation is required only if the States default.

For all these reason, I hope that further progress in this area will not be stalemated by legal uncertainties, and I urge EPA to continue to press for implementation of the necessary programs.

It should be noted that the various mechanisms provided to induce voluntary State implementation of approved or promulgated measures, such as cutoffs of highway funds for failure to implement such measures, are intended to provide alternatives to injunctive actions under section 113, thus allowing the Administrator to avoid compulsion where he believes that implementation can be assured by other means.

Cong. Rec. S9168 (June 8, 1977).

It should be noted that references both in the report and statement were to section 113, without distinguishing between 113(a)(1) and 113(a)(2). The regulation which makes a violator subject to an enforcement action is equally imprecise. It provides that failure to comply with "any approved regulatory provision of a state implementation plan" renders the person or governmental entity so failing "subject to enforcement action under section 113 of the Clean Air Act." 40 C.F.R. § 52.23 (1976). However, a reasonable meaning of these comments is that both procedures set forth in section 113 are available when violations of an implementation plan result from failure of a state to carry out a duty imposed upon it by a plan. There is no indication in the legislative history that EPA is

limited to proceeding under section 113(a)(2) in every situation where a state is an offending party.

D.

The district court was faced with a difficult problem of statutory construction and properly sought an interpretation which would not require a decision on the constitutionality of the Act. However, when section 113 is examined in its entirety it is not clear that (a)(1) and (a)(2) prescribe different means of enforcement under different sets of circumstances as contended by the State. They may be read to provide alternative mechanisms for dealing with a state's failure to comply with the provisions of an implementation plan. Both subsections permit proceedings against "any person" in violation of "any requirement" of an implementation plan. 40 C.F.R. § 52.1878(e) makes it a requirement of the Ohio plan that vehicles which do not comply with inspection and maintenance standards be denied registration and the right to operate on the public streets and highways of Cincinnati and Hamilton County. By refusing to comply with this requirement the State of Ohio became a "person" in violation of a provision of the plan. To proceed under section 113(a)(2), in effect displacing the State as regulator of motor vehicles during a "period of federally assumed enforcement," would be a more drastic remedy than the one chosen by EPA in this case.

As the legislative history makes clear, EPA has at its disposal several mechanisms for obtaining voluntary compliance by a state. When these fail, and resort is had to section 113, we find nothing in the language of the Act which requires EPA to utilize (a)(2)

rather than proceeding directly against the state, as it could against any other person in violation, pursuant to section 113(a)(1). Under these circumstances we are constrained to agree with the interpretation of the Act adopted by the Administrator and hold that EPA properly proceeded against the State under section 113(a)(1). Therefore, we conclude that the district court erred in its holding to the contrary.

We do not reach this conclusion on the basis of EPA's argument that the State is itself a polluter by reason of its ownership of streets and highways. We find nothing in the Act or legislative history to support this strained construction. Senator Muskie's reference to the "substantial, if unintentional. role" of the states in causing pollution does not support EPA's argument. Ownership and control of streets and highways along with the historic practice of licensing vehicles, however, do combine to provide a completely rational basis for placing upon the State the obligation to prevent use of these facilities by noncomplying vehicles. When the State fails to perform that duty it becomes a person in violation of a requirement of the implementation plan. As a violator, the State is subject to the enforcement procedures of section 113(a)(1). We prefer this straightforward interpretation of the Act to the convoluted arguments of EPA.

V.

Our holding above requires treatment of the constitutional arguments put forward by the State. The State of Ohio does not dispute the fact that air pollution is a national problem and that its control by Congress is within the authority granted by the Commerce

Clause. The State maintains, however, that requiring it to enforce part of a plan promulgated by EPA represents an unconstitutional intrusion into its activities as a state.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court held that the 1974 amendments to the Fair Labor Standards Act were unconstitutional in attempting to extend minimum wage and maximum hour provisions to employees of states and political subdivisions. The Court considered the costs which the states would incur if required to comply with the FLSA. Beyond that, however, the Court concluded that the effect of the 1974 amendments would be to displace state decisions and policies and possibly require substantial restructuring of the traditional ways in which states have chosen to manage their affairs.

The critical question, as stated by the Supreme Court in *National League of Cities, supra*, 426 U.S. at 851, is whether the federal action "will impermissibly interfere with the integral governmental functions . . ." of the state. It cannot be questioned that any injunctive action by the United States against a state puts stress on our federal system. Nevertheless, a scheme which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the proscription of the Tenth Amendment if it leaves the states free to make choices which are essential to their functions as states. In the present action, EPA does not seek to revamp the Ohio system of vehicle licensing or, for that matter, of operating its streets and highways. The regulation which EPA seeks to enforce does not require the State to adopt legislation, establish new

regulatory agencies or change its procedures for registering vehicles. It merely requires the State to deny use of state-owned facilities to those whose use adds to the national problem of pollution. Further it does not appear that compliance will entail large expenditures by the State.

In *National League of Cities*, the Court reaffirmed the vitality of its decision in *Fry* v. *United States*, 421 U.S. 542 (1975). In *Fry* the Supreme Court described the Tenth Amendment as follows:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States* v. *Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547, n. 7

We do not believe requiring Ohio to deny registration to noncomplying vehicles will impair the integrity of the State or its ability to function in the federal system. The federal interest in controlling air pollution far outweighs any state interest in permitting noncomplying vehicles to use public streets and highways. Justice Blackmun filed a concurring opinion in *National League of Cities* in which he wrote:

> In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, *and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstra-*

bly greater and where state facility compliance with imposed federal standards would be essential.

426 U.S. at 856 (emphasis added).

We conclude that the provision permitting EPA to enforce a regulation which requires the State to withhold registration from vehicles that do not comply with applicable pollution standards and procedures represents a lawful exercise by Congress of its power to regulate interstate commerce.

We have considered the State's contention that the proceedings under section 113(a)(1) violate Article IV, Section 4 of the Constitution (guarantee to each state of a republican form of government) and the Fifth Amendment, but find them to have no merit.

VI.

In its cross-appeal the State makes two arguments. In the first place it contends that 40 C.F.R. § 52.1878 (e) is ambiguous, and properly construed, should be read to impose duties on Cincinnati and Hamilton County, but not on the State. This argument is based on the fact that there is no "connective word" between the reference to the City and County and to the State. However, only the State requires registration of title, and it is clear that this requirement of the regulation refers to the State. The regulation could have been drawn more precisely, but we do not find it to be ambiguous. The State also contends that the regulation should be construed not to apply to it because it provides criminal penalties. This argument assumes an ambiguity which we have found not to exist.

The State makes the somewhat related argument that EPA's interpretation of the regulation is entitled

to no special deference since the enforcement statute (section 113(c)) provides criminal penalties. In this action EPA did not seek criminal sanctions. It proceeded under section 113(b) which provides for an injunction or a civil penalty of $25,000 per day of violation, or both. The decision of the district court that 40 C.F.R. §52.1878(e) applies to the State as well as to the City and County was made in an action in which EPA sought an injunction only against the State. The cross-appeal discloses no error on the part of the district court in construing or applying the regulation.

The judgment of the district court is reversed on direct appeal and affirmed on cross-appeal, and the cause is remanded for further proceedings.

WEICK, Circuit Judge, dissenting:

I respectfully dissent. As the majority concedes, we are treading on virgin territory. No court has ever enforced upon a state any order similar to the one involved here. I believe that District Judge Duncan arrived at the correct result and I would affirm his decision.

The Director of the State of Ohio Department of Highway Safety had no legal authority to withhold licenses to persons applying for them to operate their automobiles, in order to enforce regulations adopted by EPA which were claimed to have been violated not widespread in Ohio, but only in the Cincinnati, Hamilton County area. It would require legislation to be enacted by Ohio's legislature. The state legislature had not enacted such enabling legislation and in its absence EPA cannot proceed against a state officer who had no authority to act nor could EPA order the state to enact the necessary legislation.

The argument of EPA that because Ohio owns title to the highways, it is a polluter and may be proceeded against both criminally and civilly. This argument borders on being frivolous. It is a non sequiter. If the state operated a truck on the public highways in violation of an EPA regulation or operated a plant or other facility in violation thereof, it could be proceeded against directly by EPA. By no stretch of the imagination, however, could the state be held liable civilly or criminally because of the violation by other persons of EPA regulations merely because the state legislature took no action enabling state officers to enforce federal laws or regulations. This position of EPA was rejected in *Brown* v. *EPA*, 566 F. 2d 695 (9th Cir. 1977). To proceed against the state of Ohio under these circumstances not only deprives the state of due process of law but of the equal protection of the law as guaranteed by the Constitution of the United States. It would also violate the plainest principles of federalism. *National League of Cities* v. *Usery*, 426 U.S. 833; *United States v. Best*, 573 F. 2d 1095, 1103 (9th Cir. 1978). The state should no more be required to enforce federal laws than the federal government should be required to enforce state laws.

Ohio is a sovereign state and has sovereign immunity under the Eleventh Amendment to the Constitution. It may not be sued in Ohio's courts for damages by private individuals. *Kraus, Admr.* v. *State*, 31 Ohio St. 2d 132 (1972). A suit against a state agency in Ohio is in substance and effect a suit against the state and may not be maintained. *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 29 (1959); *State ex rel. Williams* v. *Glander*, 148 Ohio St. 188 (1947).

EPA obviously must not be very confident of the merits of its case when it moved this court to dismiss its appeal as moot because Ohio had enacted legislation to implement its procedures but which in no way governs, controls or applies to the issues of this appeal. We ought to comply with EPA's request and dismiss its appeal not because the issues are moot but because its appeal lacks merit and asserts grave constitutional questions which should not be necessary for us to decide. *Cf. United States* v. *Washington*, 573 F. 2d 1118 (9th Cir. 1978).

Other concessions made by EPA of the invalidity of its own regulations were detailed by the Supreme Court in *EPA* v. *Brown*, 431 U.S. 99 (1977). These regulations were held invalid in *Brown* v. *EPA*, 521 F. 2d 827 (9th Cir. 1975); *Arizona* v. *EPA*, 521 F. 2d 825 (9th Cir. 1975); *District of Columbia* v. *Train*, 521 F. 2d 971 (1975); *Maryland* v. *EPA*, 530 F. 2d 215 (4th Cir. 1975). Because of these concessions the Supreme Court remanded all four cases for consideration of mootness and other questions. On remand, EPA made a further concession that the statute does not permit it to compel state enforcement. *Brown* v. *EPA*, 566 F. 2d 665, 659 n. 2 (9th Cir. 1977); *District of Columbia* v. *Costle*, 567 F. 2d 1091 (D.C. Cir. 1977) remanded for further administrative proceedings.

The conduct of EPA in coercing states to enforce its regulations by withholding federal funds to which the states were entitled for other purposes has been condemned. See article in Wall Street Journal entitled "Exhausting States' Rights", August 5. 1980.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVSION

UNITED STATES OF AMERICA,
Plaintiff

-v-

OHIO DEPARTMENT OF HIGHWAY SAFETY AND DONALD D. COOK, DIRECTOR
Defendants

Case No. C-2-76-835

MEMORANDUM AND ORDER

On June 22, 1976, a regional administrator of the Federal Environmental Protection Agency, purporting to act under § 113(a)(1) of the Clean Air Act Amendments of 1970, P.L. 91-604, 84 Stat. 1679, 42 U.S.C. § 1857c-8(a)(1), ordered defendant Department of Highway Safety of the State of Ohio to comply with 40 C.F.R. § 52.1878(e). After the department and its director failed and refused to comply with the regional administrator's order, the Attorney General of the United States and the United States Attorney for the Southern District of Ohio caused this enforcement action to be filed pursuant to § 113(b) of the 1970 amendments, 42 U.S.C. § 1857c-8(b). Plaintiff seeks only injunctive relief.

Plaintiff has moved for summary judgment. The facts are not in dispute. The questions presented here are questions of law: whether defendants may contest

the legality of the regional administrator's order before this Court in an enforcement proceeding and whether the order is lawful under the statute and the United States Constitution. The Court has reviewed the memoranda submitted by the parties and by those granted leave to appear as amici curiae, Ohio Antique Automobile Clubs and Pacific Legal Foundation. The Court has concluded, for reasons set forth hereinbelow, that the June 22, 1976, order is not enforceable.

I

Put briefly, the Clean Air Act Amendments of 1970 required the Administrator of the EPA to promulgate national primary and secondary ambient air quality standards, required the various states to develop and submit to the EPA an implementation plan covering each air quality control region within the state, and required the Administrator to promulgate state implementation plans for states which failed to submit a plan or for states whose plans were inadequate. See §§ 109 and 110 of the amendments, 42 U.S.C. §§ 1857c-4 and 1857c-5. See also *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60, 64-67 (1975).

The State of Ohio submitted a state implementation plan, but the Administrator found it inadequate because it did not "provide for the attainment and maintenance of the national standard for photochemical oxidants (hydrocarbons) in the Metropolitan Cincinnati interstate region by May 31, 1975," 40 C.F.R. § 52.1877

Acting pursuant to §110(c) of the 1970 amendments, 42 U.S.C. §1857c-5(c), the Administrator prepared and published as part of the Ohio implementation

plan 40 C.F.R. §52.1878, which pertains to Hamilton County, Ohio, including the City of Cincinnati, see §52.1878(b). Pursuant to the Administrator's action, both the county and the city have established inspection and maintenance programs involving light-duty motor vehicles operated within their jurisdictions.

II

Subsection (e) of 40 C.F.R. §52.1878 provides as follows:

> After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and procedures, as defined in paragraph (d) (2) of this section. This shall not apply to the initial registration of new vehicles.

As a threshold matter, defendants argue that this language imposes no duty upon the State of Ohio or its Department of Highway Safety. Defendants read the language to apply only to Cincinnati and Hamilton County; the phrase "the State of Ohio" is not preceded by a conjunction, and defendants insist that it merely completes a legal description of the affected city and county.

In similar regulations affecting other regions of the country, the Administrator has done a better job of indicating that non-registration provisions applies to

the state and its agencies.[1] Although the regulation at issue here is not as precise as others, in my view it is both fair and reasonable to construe §52.1878(e) as having application to the State of Ohio in general and the Department of Highway Safety in particular. Under Ohio law this department is required to "administer and enforce the laws relating to the registration [and] licensing . . . of motor vehicles." R.C. 5502.01. The prohibition against registration of motor vehicles must necessarily apply to the Ohio Department of Highway Safety, because it is this department, not Cincinnati or Hamilton County, which is charged under law with regulating the licensing and registration of Ohio motor vehicles. To construe the regulation to apply only to the city and county would be to impose upon Cincinnati and Hamilton County a responsibility which they could not fulfill under Ohio law.

While purportedly acting pursuant to 42 U.S.C. §1857c-5(c), the Administrator promulgated §52.1878 as a part of Ohio's implementation plan. Concerning judicial review of such promulgations, §307(b) (1) and (2) of the 1970 amendments, 42 U.S.C. §1857h-5(b) (1) and (2), provides as follows:

> A petition for review of the Administrator's action in approving or promulgating any implementation

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[1] The regulation affecting California, 40 C.F.R. §52.242(d), is typical:

> After September 30, 1976, the State shall not register or allow to operate on its streets or highways any light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

> plan uuder section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> Action of the Admnisitrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

The instant action is an enforcement proceeding brought in a court of appeals. In *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1, 6 (6th Cir. 1976), stating that "there is no doubt that appellant could have challenged the standard through the procedure outlined in Section 307(b) (1) had it chosen to do so," the United States Court of Appeals for the Sixth Circuit held that the district court was without jurisdiction to consider in a criminal enforcement proceeding a defendant's allegations that an emission standard was legally invalid. Defendants in the present case do not argue that they or the State of Ohio could not have obtained review in the Court of Appeals of the Administrator's action promulgating §52.1878 as part of Ohio's implementation plan. Given the fact that the regulation in question was promulgated as an amendment to the state's implementation plan, and given my holding hereinabove that §52.1878(e), read fairly, has application to the State of Ohio, it would appear that many if not all of the statutory and constitutional contentions now advanced by defendants are matters with respect to which review could have been obtained in the Court of Appeals. Perhaps it would seem to follow under 42 U.S.C. §1857h-5(b) (2) and *Adamo Wreck-*

ing, supra, that this Court has no jurisdiction in this enforcement proceeding to consider defendants' collateral attacks upon §52.1878(e).

III

Because plaintiff seeks to invoke the equitable powers of this Court, and because there exists in §52.1878(e) at least some ambiguity concerning its applicability to the State of Ohio, the Court is hesitant to grant plaintiff summary judgment solely on the ground that the State of Ohio did not petition the Court of Appeals for review of subsection (e) when it was promulgated. Moreover, notwithstanding the limitation upon review found in §307(b), 42 U.S.C. §1857h-5(b), I perceive it to be the district court's responsibility in an enforcement proceeding to inquire whether the order which the Administrator wants enforced was issued in conformity with applicable statutory requirements.

The 1970 amendments provided that each state must submit an implementation plan to the federal EPA. Congress empowered the Administrator to disapprove part or all of each submitted implementation plan, and, upon such disapproval, to promulgate for the state an acceptable plan. The amendments provide that the Administrator "shall approve" a state's submitted implementation plan if, among other things, "it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards." Section 110(a) (2) (G), 42 U.S.C. §1857c-5(a) (2) (G). Although plainly contemplating that any approved plan would include procedures for enforcing "compliance with applicable emission standards" by means of "periodic inspection and testing of motor vehicles," this

statutory language does not establish a particular kind of enforcement procedure which must be utilized.

With respect to any approved state implementation plan, whether drawn by a state pursuant to 42 U.S.C. §1857c-5(a) or by the Administrator pursuant to 42 U.S.C. §1857c-5(c), the power of the Administrator to compel compliance in the face of violations is governed by 42 U.S.C. §1857c-8(a) (1) and (2).[2] Sub-

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[2] 42 U.S.C. §1857c-8(a) (1) and (2) provide as follows:

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to ocmply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person —

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

section (a) (1) is applicable if the Administrator "finds that any person is in violation of any requirement of an applicable implementation plan." Subsection (a) (2), on the other hand, is applicable if the Administrator "finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively." If the subsection (a) (1) finding is made, the remedy is an agency order against the non-complying person or an enforcement proceeding in a district court. If, however, a finding is made under subsection (a) (2), the remedy is public notice of the finding of non-enforcement by the state plus imposition of a "period of federally assumed enforcement."

In this case, the EPA has made a finding against the State of Ohio under subsection (a) (1) of 42 U.S.C. §1857c-8. The regional administrator found on March 15, 1976, that the State of Ohio was in violation of part of Ohio's implementation plan, namely, 40 C.F.R. §52.1878(e). The Administrator has not found under subsection (a) (2) that there have been widespread violations appearing to result from a lack of state enforcement.[3]

I do not read 42 U.S.C. §1857c-8(a) (1) to mean that if the Administrator includes in a §1857c-5(c) promul-

[3] In an affidavit submitted by plaintiff in support of its motion, Stephen K. Goranson, an EPA data analyst, avers that one air quality analyzer in Cincinnati recorded 190 vehicular emission violations during 1975. This does not suffice as a 42 U.S.C. §1857c-8(a) (2) finding of widespread violations by the Administrator, nor does the record reflect that the Administrator ever gave the required subsection (a) (2) public notice of such finding. Instead, the Administrator has proceeded under subsection (a) (1).

gation a provision such as 40 C.F.R. §52.1878(e), which specifically defines an enforcement avenue, he may therefore issue a §1857c-8(a) (1) order to compel the enforcing agency so named to implement such enforcement. Such a construction would severly undercut the statutory preference for state-created and state-enforced plans, and would shift the statutory emphasis away from compliance with emission standards, and towards compliance with federally-chosen enforcement techniques. I am convinced that if the Administrator is confronted with a non-enforcing state, his procedure under this statute is governed by subsection (a) (2) of §1857c-8, which specifically concerns a case where violations are so widespread that they appear to result from the state's non-enforcement. I do not believe that the Administrator can avoid proceeding under subsection (a) (2) by including specific state enforcement avenues in his §1857c-5(c) promulgation and then issuing orders against the state under subsection (a) (1).

IV

This Court will readily admit that many questions which arise from the statutes and regulations cited herein have not been addressed. In this enforcement proceeding, as I see it, this Court should only decide those questions necessary to determine whether to compel defendants to act. Therefore, what, if any, action the Administrator could compel against the State of Ohio after a finding of "widespread non-compliance as to indicate lack of state enforcement" is not reached. Likewise, discussion of a possible constitutional issue is inappropriate.

V

For the reasons set forth hereinabove, I conclude that paragraph (A) of the June 22, 1976, order of the regional administrator issued under 42 U.S.C. §1857c-8(a) (1) is unenforceable. Plaintiff's motion for summary judgment is accordingly DENIED without prejudice. The motion of Pacific Legal Foundation for leave to participate as amicus curiae is GRANTED.

So ORDERED.

/s/ ROBERT M. DUNCAN, *Judge*
United States District Court

APPENDIX C

Codification. The Clean Air Act, Act July 14, 1955, c. 360, 69 Stat. 322, as amended, formerly classified to this chapter, was completely revised by Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 685, and is now classified to section 7401 et seq. of this title. Under this arrangement former sections of this title are now set out according to the following table:

Old Sections	New Sections	Old Sections	New Sections
1857	7401	1857f-6c	7545
1857a	7402	1857f-6d	Repealed
1857b	7403	1857f-6e	7546
1857b-1	7404	1857f-6f	7547
1857c	7405	1857f-7	7550
1857c-1	7406	1857f-8	Repealed
1857c-2	7407	1857f-9	7571
1857c-3	7408	1857f-10	7572
1857c-4	7409	1857f-11	7573
1857c-5	7410	1857f-12	7574
1857c-6	7411	1857g	7601
1857c-7	7412	1857h	7602
1857c-8	7413	1857h-1	7603
1857c-9	7414	1857h-2	7604
1857c-10	Repealed	1857h-3	7605
1857d	7415	1857h-4	7606
1857d-1	7416	1857h-5	7607
1857e	7417	1857h-6	7608
1857f	7418	1857h-7	7609
1857f-1	7521	1857i	7610
1857f-2	7522	1857j	7611
1857f-3	7523	1857j-1	7612
1857f-4	7524	1857j-2	7613
1857f-5	7525	1857j-3	7614

Old Sections	New Sections	Old Sections	New Sections
1857f-5a	7541	1857k	7615
1857f-6	7542	1857l	7616
1857f-6a	7543	1858	7641
1857f-6b	7544	1858a	7642

38 FEDERAL REGISTER

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Ohio Transportation Control Plan

On June 15, 1973, the Administrator disapproved the required Ohio air quality control plan revisions for the Metropolitan Dayton Intrastate, Metropolitan Toledo Interstate, and Metropolitan Cincinnati Interstate Air Quality Control Regions (AQCR) because they failed to fulfill the requirement for the timely submittal of transportation and/or land use control plans (38 FR 16550, June 22, 1973). The plan was to demonstrate the attainment of the photochemical oxidant air quality standard in the Regions by May 31, 1975.

Subsequent to this disapproval action, the Governor of Ohio submitted on July 2, 1973, the "Implementation Plan to Achieve Ambient Air Quality Standard for Photochemical Oxidant in the Cincinnati Air Quality Control Region" and the "Implementation Plan to Achieve Ambient Air Quality Standard for Photochemical Oxidant in the Toledo Air Quality Control Region." Ohio submitted its plan for the Dayton AQCR on July 24, 1973. EPA, Region V, received these plan revisions for Cincinnati, Toledo, and Dayton Regions on July 16 and August 3, 1973, respectively. Receipt of the Ohio revisions was announced on August 15,

1973 (38 FR 22045). No comments were received on the plan revisions during the comment period provided.

On July 2, in response to court order and the requirements of the Clean Air Act and based upon information available to EPA at the time, a notice of proposed rule making setting forth a transportation control plan for the Metropolitan Cincinnati Interstate AQCR was issued (38 FR 17702); no new regulations were proposed for the Metropolitan Toledo Interstate and the Metropolitan Dayton Intrastate AQCR as it appeared that existing stationary source regulations in conjunction with the FMVCP would be adequate to ensure attainment of the national photochemical oxidant standard by May 31, 1975.

On July 25, 1973, the EPA held a public hearing on the proposed Federal plan for the Metropolitan Cincinnati AQCR.

PLAN ASSESSMENT METROPOLITAN DAYTON INTRASTATE AQCR

EPA tendered a statement regarding the State's plan for the Metropolitan Dayton Intrastate AQCR at the Ohio Environmental Protection Agency hearing held on May 17, 1973. This statement, based on an emission inventory for 1972 and air quality data for 1972, indicated that 1972 air quality data should be used as a basis for determination of adequate strategies for the attainment of the national photochemical oxidant standard by May 31, 1975. Reevaluation of the emission inventories for both 1971 and 1972, reanalysis of air quality data for 1971 and 1972, and consideration of available air quality data for 1973 prompted reconsideration of the hearing statement. The revised

emission inventories for 1971 and 1972 are both considered adequate. With regard to the air quality data for 1971, an abnormally high pollution level occurred on August 30. The occurrence of a similar event is considered unlikely, based upon two subsequent years of air quality data. It is not considered appropriate to base transportation control strategies on data resulting from such an event. All other air quality data for 1971 and 1972 are considered valid for characterization of oxidant levels occurring in the Dayton area. From the reanalysis of the 1971 and 1972 air quality data coupled with consideration of the revised Montgomery County hydrocarbon emission inventory, it is the opinion of the Administrator that the non-regulatory plan revisions submitted by the State indicate that the photochemical oxidant air quality standard will be attained in the Metropolitan Dayton Intrastate AQCR by May 31, 1975. The strategies outlined in the plan would rely upon strict engorcement of existing stationary source hydrocarbon regulations coupled with the estimated impact of the Federal Motor Vehicle Control Program.

Most recently the Region V EPA office has been apprised of presently invalidated data for September of 1973 which, while continuing to verify the conclusions reached regarding the abnormality of the August 30, 1971, data, indicates that a further plan revision may be required to adequately assure attainment and maintenance of the oxidant standard. This future revision to the State Plan, if found necessary, would require the implementation of those contingency strategies outlined in the State Plan submitted on July 24, 1973. These strategies include:

(1) A county-wide inspection and maintenance pro-

gram for light-duty vehicles. This system would require successful completion of the test on an annual basis as a prerequisite to vehicle registration. Programs similar to this are being developed and implemented in several urban areas across the nation.

(2) Improvements to the mass transit system to reverse the present trend of steadily declining ridership. The program would seek to improve transit ridership through a reduction of fares, a shuttle bus service for the Dayton Central Business District, and creation of a park and ride system.

Information employed to reach this determination of approval may be found in the Evaluation Report for the submittal plan. This report is available at the Freedom of Information Center, EPA, Room 329, 401 M Street SW, Washington, D.C. 20460; and at the Region V Offive, 1 North Wacker Drive, Chicago, Illinois 60606.

METROPOLITAN TOLEDO INTERSTATE AQCR

EPA's evaluation of the Ohio plan indicates that the non-regulatory plan revision submitted by Ohio evidences assurance that existing regulations will provide for the attainment of the air quality standard in the metropolitan Toledo Interstate AQCR area by May 31, 1975. The original State implementation plan as submitted January 31, 1972, indicated that a reduction in hydrocarbon emissions would occur between 1971 and 1975. The effects of the Federal Motor Vehicle Control Program were estimated, however, using national, instead of local, averages for vehicle age distribution and traffic growth and a presently obsolete method of computing automobile emissions. DeLeuw, Cather, and Company gathered transportation data characteristic of Toledo and utilized the presently ap-

proved methodology for computing motor vehicle emissions that is detailed in Compilation of Air Pollutant Emission Factors, EPA Publication AP-42. Their calculations, found in Appendix C of the Ohio plan for Toledo, indicates that mobile sources contribute a smaller percentage of hydrocarbon emissions than originally estimated. Therefore, control of stationary sources was found to have a greater effect on the overall reduction of hydrocarbons than originally estimated. Information employed to reach this determination is documented in the Evaluation Report for the Metropolitan Toledo Interstate AQCR. This report is available at the Freedom of Information Center, Environmental Protection Agency, Room 329, 401 M Street SW., Washington, D.C. 20460, and the Region V Office, 1 North Wacker Drive, Chicago, Illinois 60606.

METROPOLITAN CINCINNATI INTERSTATE AQCR

Review of the State plan for the Metropoliton Cincinnati AQCR indicates that the plan as submitted is marginally inadequate in itself to ensure the attainment of the air quality standard by May 31, 1975. Thus, it is necessary to supplement the applicable plan with a Federal inspection/maintenance program. Information employed in reaching this determination may be found in the Technical Support Document that is available at the Freedom of Information Center, EPA, Room 329, 401 M Street, SW., Washington, D.C. 20460; and at the Region V Office, 1 N. Wacker Drive, Chicago, Illinois 60606.

Pollution in the AQCR. The Metropolitan Cincinnati AQCR is comprised of approximately 3000 square miles of land area located in the extreme southwestern

portion of Ohio, the adjacent State of Indiana, and the Commonwealth of Kentucky. The Indiana portion includes Dearborn and Ohio Counties; the Kentucky portion includes Boone, Campbell, Kenton, Carroll, Gallatin, Grant, Owen, and Pendleton Counties; and the Ohio portion includes Butler, Clermont, Hamilton, and Warren Counties. Since the Administrator, on May 31, 1972, approved the plans submitted by Indiana and Kentucky demonstrating the attainment of the national photochemical oxidant standard in those states' portions of the AQCR, this proposal is directed at attainment of the standard in the Ohio portion of the AQCR. The population of the AQCR is about 1.7 million persons, approximately 80 percent of whom reside within the Ohio portion of the AQCR. (Sixty percent resides within Hamilton County.)

The primary national ambient air qulity standard for photochemical oxidants is 160 $\mu g/m^3$ (0.08 ppm) average for a 1-hour period not to be exceeded more than once per year. In 1971 this standard was exceeded 59 times in downtown Cincinnati. The second highest concentration was 277 $\mu g/m^3$ (0.14 ppm) and is the basis for the calculations in the Ohio Implementation Plan, which requires a 43 percent reduction in total hydrocarbon emissions according to Appendix J (40 CFR Part 51). There is no reason to believe that 1971 was a year of unusually high oxidant concentrations in Cincinnati; in fact, comparable concentrations were measured in previous years. This concentration was not exceeded during the first two quarters of 1972; validated air quality data for the last two quarters of 1972 are not yet available. The original implementation plan included a commitment to enlarge the air monitoring network for measuring oxidants in the AQCR.

Ohio Transportation Control Plan. The State plan revision estimates that the applicable standards will be attained by July 1975 in the Metropolitan Cincinnati Interstate AQCR through the enforcement of previously adopted stationary source hydrocarbon regulations as submitted with the January 31, 1972, Ohio State Implementation Plan, through the completion of various highway improvements, and through the implementation of the Federal Motor Vehicle Control Program (FMVCP). This plan revision contains a reevaluation of the effects of the above-named measures and contains no new control measures. The plan estimates that a 44 percent reduction in hydrocarbon emissions will occur with implementation of the plan within Hamilton County between 1971 and mid-1975.

The State plan indicated that the estimated reductions in hydrocarbon emissions from stationary sources were the result of an updated emission inventory using the emission factor techniques outlined in the EPA document entitled *Compilation of Air Pollution Emission Factors* (AP-42). In addition, the State plan projected considerable reductions in reactive hydrocarbon emissions through the strict enforcement of State regulation AP-5. Because the claimed emission reductions rely in many instances upon solvent switching by a substantial percentage of the total stationary sources, the EPA believed these estimates to be optimistic at best, since serious questions exist today regarding not only the availability of the necessary amounts of non-reactive solvents, but also the operational problems expected to occur through the total use of non-reactive solvents now on the market. However, the Administrator has accepted the stationary source emission reductions claimed with some reservation, realizing that some margin of safety could be obtained by not ap-

proving certain more questionable emission reduction claimed elsewhere in the State plan.

The estimated impact of the FMVCP was caluculated by a private consultant to the EPA using 1971 and 1975 traffic data supplied by the City of Cincinnati. The actual emission factors applied in the analysis were caluculated using the techniques described in AP-42. Adjustments were made by EPA to effect the interim 1975 automobile emission standards. The overall estimates of hydrocarbon emission reductions was believed to be reasonable and was consequently accepted by the Administrator.

The remainder of the overall hydrocarbon emission reductions set forth in the State plan was primarily due to the estimated impact of the completion of several bridges in the Metropolitan Cincinnati Area, in conjunction with the anticipated impact of some associated highway improvements. These estimates were carefully studied by the Administrator based on two questions:

(1) Will the bridge completions and anticipated highway improvements actually serve to decrease vehicular congestion and increase average vehicle speeds to the extent estimated in the State plan?

(2) Will the bridge structures and the necessary approaches be completed within the timeframe that is consistent with the required air quality standard achievement date of May 31, 1975?

With respect to the first issue, analysis performed by the EPA and supplemental data supplied by a private consultant to the EPA indicated that the bridges and their approaches could have the estimated impact of a 2 mile-per-hour increase in average vehicle speed. However, the assumption was made by the EPA that th structures would be fully operational in mid-1975.

The State plan was found to be inadequate because the completion dates estimated in the plan were incorrect. Written communication from both the Ohio EPA and the U.S. Department of Transportation Federal Highway Administration has indicated that the bridge structures themselves will be completed between late 1973 and mid-1976. In addition, the approaches to the bridge structures, which are necessary to provide for full operation and maximum use of the structures, are not expected to be fully completed before mid-1978.

It is the conclusion of the Admninistrator that, while the bridges and the associated highway improvements may be partially operational by mid-1975, too much question surrounds the emission impacts that could be estimated to occur by that date, in terms of an overall reduction in hydrocarbon emission, to give full credit for this strategy. For this reason, the Administrator has assigned little credit to the emission reductions achieved by this strategy by May 31, 1975, with the intention that any impact actually resulting may serve as a margin of safety in meeting the photochemical oxidant standard.

The rejection of the impact of the highway improvement strategy thus dictated the need for a supplemental control strategy to provide for the attainment of the standard by the required date. To this end, the EPA found the most acceptable alternative to be the originally proposed Federal strategy calling for a countywide inspection and maintenance program. With utilization of the administrative organization and facilities of the existing safety inspection program currently in operation within the City of Cincinnati, the strategy can be partially implemented by May 31, 1975. A detailed discussion of the Federal rule-making follows:

EPA transportation control plans. The Administra-

tor requires the State of Ohio to assure that all light-duty vehicles registered in Hamilton County will be properly maintained to reduce hydrocarbon emissions by requiring that all light-duty vehicles registered in Hamilton County pass an annual idle emission inspection test. A mandatory annual idle emission inspection program will provide a means for controlling at a reasonable level hydrocarbon emission from light-duty vehicles (the major source of hydrocarbon emission in the AQCR in 1975). This program can achieve the necessary reduction in a positive manner at minimum cost and inconvenience to the motoring public.

The implementation schedule for the inspection program is as follows:

(1) Submission to EPA of detailed program compliance schedule by February 1, 1974.
(2) Submission of legally enforceable program by April 1, 1974.
(3) Full operation of the actual inspection system to begin by January 1, 1975.
(4) Compliance with standards and procedures of the inspection/maintenance program prior to registration of title or operation by December 31, 1975.

As the time schedule indicates, the Administrator believes that an idle-mode inspection program with the capacity to inspect all light-duty vehicles within Hamilton County on an annual basis can begin full testing by January 1975, which is earlier than a similar program could begin in some other cities. This decision, as previously mentioned, was based upon the existence of a safety lane operation within the City of Cincinnati. The present operation has an estimated capacity of approixmately 200,000 vehicles per year. The total

capacity of this system would have to be doubled in order to provide for an annual inspection of all of the light-duty vehicles registered in the city and county. This is not an unreasonable burden as cost estimates received by the EPA from the State regarding the county-wide inspection program show costs below the national average. The total cost estimates have addressed the areas of additional inspection lane construction, the purchase of adequate sampling equipment, and the procurement of necessary manpower and training. This aspect of the Federal rulemaking is discussed in more detail later in this statement. Over 4 months are provided to obtain resolution of the potential administrative and legal problems inherent to the implementation of an inspection program. Estimates supplied to the EPA by Scott Research Laboratories indicate that 5 to 10 months should provide sufficient time for the ordering and receipt of vehicle testing equipment. This time interval may then be overlapped with a phased training program that would provide for the incremental hiring and training of personnel as the equipment is received. Therefore, the system could be fully operational by January 1, 1975. With 12 months required for the completion of the first inspection cycle, nearly half of the impact of the overall emission reduction will be realized by may 31, 1975.

At the public hearing on the Federal proposal, a number of persons asserted the impracticability of the inspection/maintenance program; however, none was able to document technical or administrative problems. One party said adding a loaded mode inspection to the program was necessary and practical. However, the additional emission reduction that could be achieved

through such a program is not necessary for attainment of the standard. Secondly, EPA believes that sufficient technology does not exist for analysis, development, and implementation of the loaded mode inspection program within the necessary time-frame. Approximately half of those persons submitting written comments to the EPA expressed support for the implementation of some form of vehicle emission inspection program.

Air Pollution Impact of Control Strategy. Based upon 1971 air quality data, demonstration of attainment of the standard by 1975 must show that hydrocarbon emissions will be reduced by 43 percent between 1971 and 1975. The emissions in Hamilton County in 1971 were 63,708 tons of hydrocarbons. In order to demonstrate attainment of the standards by 1975, the emissions must be reduced to no more than 36,314 tons. Table 1 is a summary of the effect of the strategy on the overall reduction necessary in Hamilton County.

TABLE 1.—COMPILATION OF CONTROL STRATEGY EFFECTS

[Tons per year]

	Baseline 1971	May 31, 1975
Stationary source emissions	24,754	9,464
Mobile source emissions (including effect of FMVCP and growth)	38,954	27,082
Reduction due to inspection/ maintenance		—386
Total	63,708	36,160

Basis for emission reductions. The EPA has pub-

lished in Appendix N to 40 CFR Part 51 a summary of reduction in pollutants that can be expected from the implementation of an automobile emission inspection program. This document indicates that an idle mode inspection program based upon a 30 percent rejection rate can be expected to reduce hydrocarbon exhaust emissions from light-duty vehicles by as much as 10 percent. To obtain an overall impact estimate this effect must be factored to account for the partial impact of the program by May 31, 1975, and to account for the percent of total vehicle miles traveled which will be affected by the program. The program will effect a 3 percent reduction in light-duty vehicle exhaust emissions, or a 1 percent reduction in overall HC emission by May 31, 1975.

Social and economic impact of the plan. Cost data available at this time indicates that the annual cost per vehicle of an idle-mode inspection program can range from $1.50 to $7.50 per year. This data, contained within the EPA document entitled "Control Strategies for In-Use Vehicles" also indicates that the average maintenance cost for those vehicles that fail the test would be approximately $25.50. This figure is not felt to be unreasonable as most vehicles would pass the test and those that fail would normally undergo an annual tuneup regardless of the inspection program. This will net cost per vehicle to $3.00 based on national estimate as presented in EPA White Paper *The Clean Air Act and Transportation Controls.* In addition, cost data supplied by the State of Ohio, based specifically upon the Cincinnati safety lane operation, indicates an annual cost (including updating the system and converting existing lanes) of approximately $182,000.

This estimate was subdivided as follows:

Equipment	$ 17,000
Personnel (APC)	53,500
Lane inspectors	99,500
Supplies	12,000
Total	182,000

This estimate for the testing equipment is considered to represent the lower range of cost estimates. However, even allowing for a total program cost at the upper range of $500,000, the total cost per vehicle per year would be approximately $1, which is substantially below the national average cost figures.

Several statements were given at the Federal public hearing pertaining to the potential administrative burdens of an inspection program. However, the Administrator is of the opinion that sufficient data are available from similar programs currently in operation to minimize the problems in regard to this aspect of the inspection system. Furthermore, the Administrator will provide assistance where possible in the development and implementation of the program.

This notice of final rulemaking is issued under the authority of sections 110(c) and 301(a) of the Clean Air Act.

Dated: October 25, 1973.

RUSSELL E. TRAIN,
Administrator

SUBPART KK—OHIO

SOURCE: 37 FR 10886, May 31, 1972, unless otherwise noted.

§52.1870 Identification of plan.

(a) Title of plan: "Implementation Plan for the

Control of Suspended Particulates, Sulfur Dioxide, Carbon Monoxide, Hydrocarbons, Nitrogen Dioxide, and Photochemical Oxidants in the State of Ohio."

(b) The plan was officially submitted on January 31, 1972.

(c) The revisions listed below were submitted on the dates specified.

(1) Request for extensions and a revision of montoring network was submitted on March 20, 1972, by the Ohio Air Pollution Control Board.

(2) State provisions for making emissions data available to the public was outlined in a letter of May 8, 1972, by the Ohio Department of Health.

(3) On May 9, 1972, the State provided assurance that action is being taken in the Assembly to secure authority for controlling auto emissions.

(4) Amendments to air pollution regulations AP-3-11, 12, 13, 14 and AP-9-04 were forwarded on July 7, 1972, by the Governor.

(5) Revisions to AP-2-01, 02, 04, 05; AP-3-01, 08, 09, 13; AP-9-01, 02, 03 were submitted on August 4. 1972 by the Governor.

(6) New regulations AP-13-01 and 13-02 were submitted on October 12, 1972 by the Governor.

(7) Letter from the Director of the Ohio EPA was submitted on June 6, 1973, indicating that portions of AP-3-11, and AP-3-12 are for informational purposes only.

(8) The Governor of Ohio submitted on July 2, 1973, the "Implementation Plan to Achieve Ambient Air Quality Standard for Photochemical Oxidant in the Cincinnati Air Quality Control Region" and the "Implementation Plan to Achieve Ambient Air Quality Standard for Photochemical Oxidant in the Toledo Air Quality Control Region."

(9) The Governor of Ohio submitted on July 24, 1973, the "Implementation Plan to Achieve Ambient Air Quality Standards for Photochemical Oxidants—Dayton Air Quality Control Region."

[37 FR 10886, May 31, 1972, as amended at 41 FR 8964, Mar. 2, 1976]

§52.1871 Classification of regions.

The Ohio plan was evaluated on the basis of the following classifications:

	POLLUTANT				
Air quality control region	*Particulate matter*	*Sulfur oxides*	*Nitrogen dioxide*	*Carbon monoxide*	*Photochemical oxidants (hydrocarbons)*
Greater Metropolitan Cleveland Intrastate	I	I	III	III	I
Huntington (West Virginia)-Ashland (Kentucky)-Portsmouth-Ironton (Ohio) Interstate	I	III	III	III	III
Mansfield-Marion Intrastate	II	II	III	III	III
Metropolitan Cincinnati Interstate	I	II	III	III	I
Metropolitan Columbus Intrastate	I	III	III	III	I
Metropolitan Dayton Intrastate	I	II	III	III	I
Metropolitan Toledo Interstate	I	I	III	III	I
Northwest Ohio Intrastate	II	I	III	III	III

Northwest Pennsylvania-Youngstown Interstate	I	II	III	III	III
Parkersburg (West Virginia)-Marietta (Ohio) Interstate	I	II	III	III	III
Sandusky Intrastate	III	III	III	III	III
Steubenville-Weirton-Wheeling Interstate	I	I	III	III	III
Wilmington-Chillicothe-Logan Intrastate	III	III	III	III	III
Zanesville-Cambridge Intrastate	II	IA	III	III	III

[37 FR 10886, May 31, 1972, as amended at 39 FR 16347, May 8, 1974]

§52.1872 Extensions.

(a) The Administrator hereby extends from 18 months the statutory timetable for submission of Ohio's plan for attainment and maintenance of the secondary standards for particulate matter in the Greater Metropolitan Cleveland Intrastate and in the Ohio portion of the Steubenville-Weirton-Wheeling and Northwest Pennsylvania-Youngstown Interstate Regions.

(b) [Reserved]

[37 FR 10886, May 31, 1972, as amended at 38 FR 7328, Mar. 20, 1973]

§52.1873 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Ohio's plan for the attainment and maintenance of the national standards. The State included various provisions in its plan relating to AP-3-11 (B) (4) and AP-3-12 (B) (5) which, as described in the Governor's letter of June 6, 1973, were

included for information purposes only and were not to be considered a part of the plan to implement national standards. Accordingly, these additional provisions are not considered a part of the applicable plan.

[39 FR 13542, Apr. 15, 1974]

§52.1874 [Reserved]

§52.1875 **Attainment dates for national standards.**

The following table presents the latest dates by which the national standards are to be attained. These dates reflect the information presented in Ohio's plan, except where noted.

	POLLUTANT							
	Particulate matter		*Sulfur oxides*					
Air quality control region	*Primary*	*Secondary*	*Primary*	*Secondary*	*Nitrogen dioxide*	*Carbon monoxide*	*Photochemical oxidants (hydrocarbons)*	
Greater Metropolitan Cleveland Intrastate	a	c	a	a	e	e	a	
Huntington (West Virginia)-Ashland (Kentucky)-Portsmouth-Ironton (Ohio) Interstate	a	a	e	e	e	e	e	
Mansfield-Marion Intrastate	a		d	a	e	e	e	
Metropolitan Cincinnati Interstate	a	a	d	a	e	a	May 31, 1975	
Metropolitan Columbus Intrastate	a	a	e	e	e	e	a	
Metropolitan Dayton Intrastate	a	a	e	e	e	e	May 31, 1975	

Metropolitan Toledo Interstate	a	a	a	a	e	e	May 31, 1975
Northwest Ohio Intrastate	a	a	a	a	e	e	e
Northwest Pennsylvania-Youngstown Interstate	a	c	d	a	e	e	e
Parkersburg (West Virginia)-Marietta (Ohio) Interstate	a	a	d	a	e	e	e
Sandusky Intrastate	a	a	e	e	e	e	e
Steubenville-Weirton-Wheeling Interstate	a	c	a	a	e	e	e
Wilmington-Chillicothe-Logan Intrastate	a	a	e	e	e	e	e
Zanesville-Cambridge Intrastate	a	a	a	a	e	e	e

NOTE: Dates or footnotes which are underlined are prescribed by the Administrator because the plan did not provide a specific date or the date provided was not acceptable.

a. July 1975.

b. 5 years from plan approval or promulgation.

c. 18-month extension granted.

d. Air quality levels presently below primary standards.

e. Air quality levels presently below secondary standards.

[37 FR 10886, May 31, 1972, as amended at 37 FR 15088, July 27, 1972; 37 FR 19808, Sept. 22, 1972; 38 FR 7328, Mar. 20, 1973; 38 FR 12702, May 14, 1978; 38 FR 12921, May 17, 1973; 38 FR 30974, Nov. 8, 1973; 39 FR 16847, May 8, 1974]

§52.1876 [Reserved]

§52.1877 Control strategy: Photochemical oxidants (hydrocarbons).

(a) The requirements of §51.14 of this chapter are not met because the Ohio plan does not provide for the

attainment and maintenance of the national standard for photochemical oxidants (hydrocarbons) in the Metropolitan Cincinnati interstate region by May 31, 1975.

§52.1878 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program to reduce emissions from in-use vehicles through identifying vehicles that need emission control related maintenance and requiring that such maintenance be performed.

(2) All other terms used in this section that are defined in 40 CFR Part 51, Appendix N are used herein with the meanings so defined.

(b) This section is applicable in Hamilton County, Ohio (including the City of Cincinnati).

(c) The County of Hamilton and the City of Cinnati shall establish an inspection and maintenance program applicable to all light-duty motor vehicles owned and operated within their respective geographic jurisdictions on streets, roads, and highways over which they have ownership or control.

(d) Not later than April 1, 1974, the County of Hamilton and the City of Cincinnati shall submit to the Administrator, for his approval, legally adopted regulations establishing the inspection/maintenance program required by paragraph (c) of this section. The regulations shall include:

(1) (i) Provisions requiring inspection of all light-duty motor vehicles owned and operated within their respective geographic jurisdictions on streets, roads, and highways over which they have ownership and control (jointly or individually) at periodic intervals no more than 1 year apart by means of an idle test.

(ii) The State may exempt any class or category of vehicles that the State finds are rarely used on public streets and highways (such as classic or antique vehicles).

(2) Provisions for inspection failure criteria consistent with an initial failure rate of at least 30 percent of the vehicles tested before maintenance.

(3) Provisions ensuring that failed vehicles receive within 2 weeks the maintenance necessary to achieve compliance with the inspection standards. These shall, at a minimum, impose sanctions against individual owners and repair facilities, require retest of failed vehicles following maintenance, establish a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tests satisfactorily, and provide for such other measures as necessary or appropriate.

(4) Provisions prohibiting vehicles from being intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. These might include authorization of spot checks of idle adjustments and/or requiring a suitable type of physical tagging of vehicles. These provisions shall include appropriate penalties for violation.

(5) Designation of an agency or agencies responsible for conducting, overseeing, enforcing the inspection and maintenance program. Private parties may be designated to conduct parts of the program to certify compliance.

(6) Provisions ensuring that, with regard to the first inspection, the inspection and maintenance necessary to achieve compliance with the applicable emis-

sion standards referred to in paragraph (d) (2) be completed by May 31, 1975, for at least five-twelfths (5/12) of the vehicles subject to the inspection system.

(e) After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and procedures, as defined in paragraph (d) (2) of this section. This shall not apply to the initial registration of new vehicles.

(f) After December 31, 1975, no person shall operate or allow the operation of a light-duty motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and procedures, as defined in paragraph (d) (2) of this section. This shall not apply to the initial registration of new vehicles.

(g) No later than February 1, 1974, the County of Hamilton and the City of Cincinnati shall submit to the Administrator, for his approval, a detailed compliance schedule showing the steps they will take to establish, operate, and enforce the inspection/maintenance program required by paragraph (c) of this section including:

(1) A description of the legal authority for establishing and enforcing the inspection/maintenance program, including the text of proposed or adopted legislation and regulations.

(2) Specific dates (day, month, and year) by which various steps to implement the inspection/maintenance

system will be completed, such steps to include, at a minimum, the following: Submitting final plans and specifications for the system to the Administrator for his approval, ordering necessary equipment, commencement of on-site construction and/or installation, completion of on-site construction and/or installation and system operation (this last date to be no later than January 1, 1975).

(3) An identification of the sources and amounts of funds necessary to implement the system, together with written assurances from the chief executive officers of the city and county that they will seek any necessary funding from the appropriate legislative bodies.

(4) Other necessary provisions to carry out the program.

§52.1879 Review of new sources and modifications.

(a) The requirements of §51.18 of this chapter are not met because the State failed to submit a plan for review of new or modified indirect sources.

(b) The requirements of §51.18(h) of *modified indirect sources.* The provisions of §52.22(b) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Ohio.

(c) The requirements of §51.18(h) of this chapter are not met because the State failed to submit procedures providing for public comment on review of new or modified stationary sources.

(d) Regulation providing for public comment. (1) For purposes of this paragraph, "Director" shall mean the "Director of the Ohio Environmental Protection Agency".

(2) Prior to approval or disapproval of the con-

struction or modification of a stationary source, the Director shall:

(i) Make a preliminary determination whether construction or modification of the stationary source should be approved, approved with conditions or disapproved;

(ii) Make available in at least one location in the region in which the proposed stationary source would be constructed or modified, a copy of all materials submitted by the owner or operator, a copy of the Director's preliminary determination, and a copy or summary of other materials, if any, considered by the Director in making his preliminary determination; and

(iii) Notify the public, by prominent advertisement in a newspaper of general circulation in the region in which the proposed stationary source would be constructed or modified, of the opportunity for public comment on the information submitted by the owner or operator and the Director's preliminary determination on the approvability of the new or modified stationary source.

(3) A copy of the notice required pursuant to this paragraph shall be sent to the Administrator through the appropriate regional office and to all other State and local air pollution control agencies having jurisdiction within the region where the stationary source will be constructed or modified.

42 U.S.C. § 7410-7413

§ 7410. STATE IMPLEMENTATION PLANS FOR NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

Adoption of plan by State; submission to Adminis-

trator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation. maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) Except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard,

it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national am-

bient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirement of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to im-

plement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3) (C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the

requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7327 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any enforcement action).

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans

can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under section 7410(f) or (g) of this title (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is

provided pursuant to section 7522(a) (2) of this title shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c) (5) (B) of this section.

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5) (A) (i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region. or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend

or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c) (2) (D) (ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related

air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2) (B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

Extension of period for submission of plans

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an im-

plementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 shall not be required to be promulgated before the date eight months after such date required for submission.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Inter-

state and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void on June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicabil-

ity of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/

carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces, the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1. 1979, or the date on which a plan revision under subsection (a) (2) (I) of this section is submitted, whichever is earlier. No such suspension shall

be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5) (A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the

reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

Applicable implementation plan

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will

not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

National or regional energy emergencies; determination by President

(f) (1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that —

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the deter-

minations and findings specified in paragraph (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

Governor's authority to issue temporary emergency suspensions

(g)(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines —

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

Annual publications of comprehensive document for each State setting forth requirements of applicable implementation plan

(h)(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

Modification of requirements prohibited

(i) Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

(j) As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

§ 7411. STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means—

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard —

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) of this section applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) of this section applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2) of this section) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduc-

tion achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means —

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(b)(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Adminis-

trator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

State implementation and enforcement of standards of performance

(c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

Standards of performance for existing sources; remaining useful life of source

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408 (a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority —

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

Prohibited acts

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

New source standards of performance

(f)(1) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations listing under subsection (b)(1)(A) of this section the categories of major stationary sources which are not on August 7, 1977, included on the list required under subsection (b)(1)(A) of this section. The Administrator shall promulgate regulations establishing standards of performance for the percentage of such categories of sources set forth in the following table before

the expiration of the corresponding period set forth in such table:

Percentage of source categories required to be listed for which standards must be established:	Period by which standards must be promulgated after date list is required to be promulgated:
25	2 years.
75	3 years.
100	4 years.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider —

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit:

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

Revision of regulations

(g) (1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f) (1) of this section

any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that —

(A) a new, innovative, or improved technology or process which achieves continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy

requirement) has been adequately demonstrated, the Administrator shall revise such standard of performance for such category accordingly.

(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title, the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.

(7) Unless later deadlines for action of the Administrator are otherwise prescribed under this section or section 7412 of this title, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either —

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(8) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

Design, equipment, work practice, or operational standard; alternative emission limitation

(h) (1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in

emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

Country elevators

(i) Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

Innovative technology systems of continuous emission reduction

(j) (1) (A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this para-

graph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated.

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to any unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technolog-

ical systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amount without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

And such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of

the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1) (A) (iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D) (i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2) (A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1) (D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance sched-

ule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

§ 7412. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

Definitions

(a) For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term "new source" means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The term "stationary source", "modification", "owner or operator" and "existing source" shall have the same meaning as such terms have under section 7411(a) of this title.

List of hazardous air pollutants; emission standards; pollution control techniques

(b) (1) (A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes

each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

Prohibited acts; exemption

(c) (1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

State implementation and enforcement

(d) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

Design, equipment, work practice, and operational standards

(e) (1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will avhiece a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the re-

quirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection).

§ 7413. FEDERAL ENFORCEMENT PROCEDURES

Finding of violation; notice; compliance order; civil action; State failure to enforce plan; construction or modification of major stationary sources

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the

State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 119(g) (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this

subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith effort to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D of this subchapter, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.

Violations by owners or operators of major stationary sources

(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Fed-

erally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e) of this title, section 7412(c) of this title, section 119(g) (as in effect before August 7, 1977), subsection (d) (5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a) (5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business,

the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

Penalties

(c) (1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e), section 7412(c) of this title; or

(D) violates any requirement of section 119(g) (as in effect before August 7, 1977), subsection (b) (7) or (d) (5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part (B) of this subchapter (relating to ozone).

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or

by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

Final compliance orders

(d) (1) A State (or, after thirty days notice to the State, the Administrator) may issue to any stationary source which is unable to comply with any requirement of an applicable implementation plan an order which specifies a date for final compliance with such requirement later than the date for attainment of any national ambient air quality standard specified in such plan if—

(A) such order is issued after notice to the public (and, as appropriate, to the Administrator) containing the content of the proposed order and opportunity for public hearing;

(B) the order contains a schedule and timetable for compliance;

(C) the order requires compliance with applicable interim requirements as provided in paragraph (5)(B) (relating to sources converting to coal), and paragraph (6) and (7) (relating to all sources receiv-

ing such orders) and requires the emission monitoring and reporting by the source authorized to be required under sections 7410(a) (2) (F) and 7414(a) (1) of this title;

(D) the order provides for final compliance with the requirement of the applicable implementation plan as expeditiously as practicable, but (except as provided in paragraph (4) or (5) in no event later than July 1, 1979, or three years after the date for final compliance with such requirement specified in such plan, whichever is later; and

(E) in the case of a major stationary source, the order notifies the source that, unless exempted under section 120(a) (2) (B) or (C), it will be required to pay a noncompliance penalty effective July 1, 1979, as provided under section 7420 of this title or by such later date as is set forth in the order in accordance with section 7420(b) (3) or (g) of this title in the event such source fails to achieve final compliance by July 1, 1979.

(2) In the case of any major stationary source, no such order issued by the State shall take effect until the Administrator determines that such order has been issued in accordance with the requirements of this chapter. The Administrator shall determine, not later than 90 days after receipt of notice of the issuance of an order under this subsection with respect to any major stationary source, whether or not any State order under this subsection is in accordance with the requirements of this chapter. In the case of any source other than a major stationary source, such order issued by the State shall cease to be effective upon a determination by the Administrator that it was not issued in accordance with the requirements of this chapter. If the Administrator so objects, he shall simultaneously

proceed to issue an enforcement order in accordance with subsection (a) of this section or an order under this subsection. Nothing in this section shall be construed as limiting the authority of a State or political subdivision to adopt and enforce a more stringent emission limitation or more expeditious schedule or timetable for compliance than that contained in an order by the Administrator.

(3) If any source not in compliance with any requirement of an ipplicable implementation plan gives written notification to the State (or placement of the facility, a complete change in production process, or a termination of operation, the State (or the Administrator) may issue an order under paragraph (1) of this subsection permitting the source to operate until July 1, 1979, without any interim schedule of compliance: *Provided*, That as a condition of the issuance of any such order, the owner or operator of such source shall post a bond or other surety in an amount equal to the cost of actual compliance by such facility and any economic value which may accrue to the owner or operator of such source by reason of the failure to comply. If a source for which the bond or other surety required by this paragraph has been posted fails to replace the facility, change the production process, or terminate the operations as specified in the order by the required date, the owner or operator shall immediately forfeit on the bond or other surety and the State (or the Administrator) shall have no discretion to modify the order under this paragraph or to compromise the bond or other surety.

(4) An order under paragraph (1) of this subsection may be issued to an existing stationary source if—

(A) the source will expeditiously use new means of emission limitation which the Administrator deter-

mines is likely to be adequately demonstrated (within the meaning of section 7411(a) (1)) of this title upon expiration of the order,

(B) such new means of emission limitation is not likely to be used by such source unless an order is granted under this subsection.

(C) such new means of emission limitation is determined by the Administrator to have a substantial likelihood of—

(i) achieving greater continuous emission reduction than the means of emission limitation which, but for such order, would be required; or

(ii) achieving an equivalent continuous reduction at lower cost in terms of energy, economic, or nonair quality environmental impact; and

(D) compliance by the source with the requirement of the applicable implementation plan would be impracticable prior to, or during, the installation of such new means.

Such an order shall provide for final compliance with the requirement in the applicable implementation plan as expeditiously as practicable, but in no event later than five years after the date on which the source would otherwise be required to be in full compliance with the requirement.

(5) (A) In the case of a major stationary source which is burning petroleum products or natural gas, or both and which—

(i) is prohibited from doing so under an order pursuant to the provisions of section 792(a) of Title 15 or any amendment thereto, or any subsequent enactment which supersedes such provisions, or

(ii) within one year after August 7, 1977, gives notice of intent to convert to coal as its primary energy source because of actual or anticipated curtailment of

natural gas supplies under any curtailment plan or schedule approved by the Federal Power Commission (or, in the case of intrastate natural gas supplies, approved by the appropriate State regulatory commission),

and which thereby would no longer be in compliance with any requirement under an applicable implementation plan, an order may be issued by the Administrator under paragraph (1) of this subsection for such source which specifies a date for final compliance with such requirement as expeditiously as practicable, but not later than December 31, 1980. The Administrator may issue an additional order under paragraph (1) of this subsection for such source providing an additional period for such source to come into compliance with the requirement in the applicable implementation plan, which shall be as expeditiously as practicable, but in no event later than five years after the date required for compliance under the preceding sentence.

(B) In issuing an order pursuant to subparagraph (A), the Administrator shall prescribe (and may from time to time modify) emission limitations, requirements respecting pollution characteristics of coal, or other enforceable measures for control of emissions for each source to which such an order applies. Such limitations, requirements, and measures shall be those which the Administrator determines must be complied with by the source in order to assure (throughout the period before the date for final compliance established in the order) that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any national primary ambient air quality standard for such pollutant.

(C) The Administrator may, by regulation, establish priorities under which manufacturers of continuous emission reduction systems necessary to carry out this paragraph shall provide such systems to users thereof, if he finds, after consultation with the States, that priorities must be imposed in order to assure that such systems are first provided to sources subject to orders under this paragraph in air quality control regions in which national primary ambient air quality standards have not been achieved. No regulation under this subparagraph may impair the obligation of any contract entered into before August 7, 1977.

(D) No order issued to a source under this paragraph with respect to an air pollutant shall be effective if the national primary ambient air quality standard with respect to such pollutant is being exceeded at any time in the air quality control region in which such source is located. The preceding sentence shall not apply to a source if, upon submission by any person of evidence satisfactory to the Administrator, the Administrator determines (after notice and public hearing)—

(i) that emissions of such air pollutant from such source will affect only infrequently the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time;

(ii) that emissions of such air pollutant from such source will have only insignificant effect on the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time; and

(iii) with reasonable statistical assurance that emissions of such air pollutant from such source will not

cause or contribute to air quality concentrations of such pollutant in excess of the national primary ambient air quality standard for such pollutant.

(6) An order issued to a source under this subsection shall set forth compliance schedules containing increments of progress which require compliance with the requirement postponed as expeditiously as practicable.

(7) A source to which an order is issued under paragraph (1), (3), (4), or (5) of this subsection shall use the best practicable system or systems of emission reduction (as determined by the Administrator taking into account the requirement with which the source must ultimately comply) for the period during which such order is in effect and shall comply with such interim requirements as the Administrator determines are reasonable and practicable. Such interim requirements shall include—

(A) such measures as the Administrator determines are necessary to avoid an imminent and substantial endangerment to health of persons, and

(B) a requirement that the source comply with the requirements of the applicable implementation plan during any such period insofar as such source is able to do so (as determined by the Administrator).

(8) Any order under paragraph (1) of this subsection shall be terminated if the Administrator determines on the record, after notice and hearing, that the inability of the source to comply no longer exists. If the owner or operator of the source to which the order is issued demonstrates that prompt termination of such order would result in undue hardship, the termination shall become effective at the earliest practicable date on which such undue hardship would not

result, but in no event later than the date required under this subsection.

(9) If the Administrator determines that a source to which an order is issued under this subsection is in violation of any requirement of this subsection, he shall—

(A) enforce such requirement under subsections (a), (b), or (c) of this section,

(B) (after notice and opportunity for public hearing) revoke such order and enforce compliance with the requirement with respect to which such order was granted,

(C) give notice of noncompliance and commence action under section 7420 of this title, or

(D) take any appropriate combination of such actions.

(10) During the period of the order in effect under this subsection and where the owner or operator is in compliance with the terms of such order, no Federal enforcement action pursuant to this section and no action under section 7604 of this title shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirement for the source covered by such order.

(11) For the purposes of section 7410, 7604, and 7607 of this title, any order issued by the State and in effect pursuant to this subsection shall become part of the applicable implementation plan.

(12) Any enforcement order issued under subsection (a) of this section or any consent decree in an enforcement action which is in effect on August 7, 1977, shall remain in effect to the extent that such order or consent decree is (A) not inconsistent with the requirements of this subsection and section 7419 of this title

or (B) the administrative orders on consent issued by the Administrator on November 5, 1975 and February 26, 1976 and requiring compliance with sulfur dioxide emission limitations or standards at least as stringent as those promulgated under section 7411 of this title. Any such enforcement order issued under subsection (a) of this section or consent decree which provides for an extension beyond July 1, 1979, except such administrative orders on consent, is void unless modified under this subsection within one year after August 7, 1977, to comply with the requirements of this subsection.

42 U.S.C. § 7607. ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

Administrative subpenas; confidentiality; witnesses

(a) (1) [1] In connection with any determination under section 7410 (f) of this title or section 7521(b) (5) of this title, or for purposes of obtaining information under section 7521(b) (4) or 7545(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such

[1] Subsec. (a) enacted without paragraph (2).

paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Judicial review

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b) (1) of this title) any determination under section 7521(b) (5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419,

or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c) (2) (A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under para-

graph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Additional evidence

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

Rulemaking

(d) (1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d) (5) of this title (but not including orders granting or denying any such orders).

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under subtitle B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibilty),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4) (A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B) (i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the

Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part

or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4) (B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection

(b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7) (B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

Other methods of judicial review not authorized

(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

Costs

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

(g) In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 3704.14 of the Revised Code be enacted to read as follows:

3704.14 Study of need for motor vehicle emission inspection and maintenance program; report; implementation; civil action, effects.

Sec. 3704.14 (A) A COMPREHENSIVE STUDY OF THE NEED FOR A MOTOR VEHICLE EMISSION INSPECTION AND MAINTENANCE PROGRAM SHALL BE CONDUCTED BY A BOARD OF NINE MEMBERS TO BE CHAIRED BY THE DIRECTOR OF ENVIRONMENTAL PROTECTION.

THE REMAINING MEMBERS SHALL BE AS FOLLOWS:

(1) THE DIRECTORS OF HIGHWAY SAFETY AND TRANSPORTATION;

(2) SIX REPRESENTATIVES TO BE NAMED BY THE DIRECTOR OF ENVIRONMENTAL PROTECTION AS FOLLOWS:

(a) TWO REPRESENTATIVES OF AUTOMOBILE USERS;

(b) ONE REPRESENTATIVE OF THE AUTOMOBILE REPAIR INDUSTRY;

(c) ONE REPRESENTATIVE OF NEW AUTOMOBILE DEALERS;

(d) ONE REPRESENTATIVE OF AUTOMOBILE MANUFACTURERS;

(e) ONE REPRESENTATIVE OF HEALTH ORGANIZATIONS.

(B) THE STUDY, USING AVAILABLE INFORMATION, SHALL INCLUDE AN ANALYSIS OF:

(1) THE NEED FOR MOTOR VEHICLE AIR CONTAMINANT EMISSION INSPECTION AND MAINTENANCE PROGRAMS;

(2) PROGRAMS INVOLVING REGISTRATION OF MOTOR VEHICLES;

(3) PROGRAMS THAT MEASURE AND ANALYZE EMISSIONS WITH ADVANCED COMPUTER TECHNOLOGY;

(4) THE EFFECTIVENESS OF PROGRAMS THAT REQUIRE EMISSIONS-RELATED INSPECTIONS AND VEHICLE MAINTENANCE;

(5) THE EFFECTIVENESS AND EFFICIENCY OF PROGRAMS OPERATED THROUGH STATE-OPERATED MOTOR VEHICLE EMISSION INSPECTION STATIONS, WITH VEHICLE MAIN-

TENANCE NOT PERFORMED AT SUCH STATIONS, IN COMPARISON WITH AND CONTRAST TO PROGRAMS OPERATED THROUGH CONTRACTOR-OPERATED INSPECTION STATIONS, WITH VEHICLE MAINTENANCE NOT PERFORMED AT SUCH STATIONS;

(6) SELF-INSPECTION AND MAINTENANCE BY AN OWNER OF A FLEET OF TEN OR MORE VEHICLES;

(7) THE EFFECTIVENESS AND EFFICIENCY OF EACH TYPE OF MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM DESCRIBED IN DIVISIONS (B)(4), (5), AND (6) OF THIS SECTION WHEN OPERATED IN CONJUNCTION WITH A STATE MOTOR VEHICLE REGISTRATION PROGRAM.

(C) THE BOARD SHALL DEVELOP AND PREPARE FOR A MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM AS NECESSARY FOR THE STATE TO COMPLY WITH REQUIREMENTS OF THE "CLEAN AIR ACT AMENDMENTS OF 1977," 91 STAT. 712, 42 U.S.C. 7401. THE DEVELOPMENT AND PREPARATION SHALL CONSIST OF A DESIGN, PLAN, AND SCHEDULE FOR THE IMPLEMENTATION OF THE NECESSARY ELEMENTS OF THE PROGRAM, BE BASED ON THE STUDY REQUIRED BY THIS SECTION, AND BE CONSISTENT WITH THE RECOMMENDATIONS CONTAINED IN THE REPORT REQUIRED BY DIVISION (D) OF THIS SECTION. THE SCHEDULE FOR THE IMPLEMENTATION OF THE NECESSARY ELEMENTS OF THE PROGRAM:

(1) SHALL BE ADEQUATE TO ALLOW AND

ACHIEVE FULL IMPLEMENTATION OF AN INSPECTION AND MAINTENANCE PROGRAM, AS IT AFFECTS MOTOR VEHICLES IN AREAS OF THE STATE THAT MAY REQUIRE THE PROGRAM, NOT LATER THAN DECEMBER 31, 1982;

(2) SHALL NOT, PRIOR TO SEPTEMBER 30, 1981, REQUIRE OR INCLUDE:

(a) MANDATORY PUBLIC PARTICIPATION IN THE PROGRAM;

(b) EXECUTION OF AGREEMENTS WITH PRIVATE CONTRACTORS TO OPERATE MOTOR VEHICLE EMISSIONS INSPECTION STATIONS;

(c) CONSTRUCTION AND ACQUISITION OF MOTOR VEHICLE EMISSION INSPECTION STATIONS AND ACQUISITION OF INSPECTION EQUIPMENT, EXCEPT AS MAY BE USEFUL OR NECESSARY TO THE CONDUCT OF THE STUDY REQUIRED BY THIS SECTION.

(3) CONSISTENT WITH OTHER REQUIREMENTS OF THIS SECTION, PRESERVE AND FACILITATE THE RANGE OF CHOICES AVAILABLE TO THE GENERAL ASSEMBLY CONCERNING THE DIRECTION AND FUTURE DEVELOPMENT OF MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAMS FOR THE STATE.

(D) THE BOARD SHALL SUBMIT TO THE GENERAL ASSEMBLY ON JULY 1, 1981 A REPORT BASED ON THE RESULTS OF THE STUDY REQUIRED BY THIS SECTION. THE REPORT REQUIRED BY THIS DIVISION SHALL CONTAIN RECOMMENDATIONS CONCERNING THE MOST FEASIBLE PROGRAM, IF ANY, FOR CONTROLLING MOTOR VEHICLE EMISSIONS IN THE

STATE, INCLUDE SPECIFIC LEGISLATIVE RECOMMENDATIONS, AND REFLECT CONSIDERATION OF THE FOLLOWING FACTORS AS THEY RELATE TO THE ALTERNATIVE PROGRAMS LISTED IN DIVISION (B) OF THIS SECTION:

(1) ACCEPTANCE BY AND PROTECTION OF CONSUMERS;

(2) OVERALL EFFECTIVENESS, INCLUDING COSTS VERSUS BENEFITS;

(3) RESULTING SOCIAL AND ECONOMIC IMPACTS;

(4) APPROPRIATE GEOGRAPHIC AREAS OF APPLICABILITY, WITH EMPHASAS UPON THE COMPARISON OF A STATEWIDE PROGRAM TO SEVERAL LOCALIZED PROGRAMS;

(5) THE OPERATION OF MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE AND REGISTRATION PROGRAMS IN OTHER STATES; AND

(6) ANY ADDITIONAL FACTORS CONSIDERED BY THE BOARD TO BE APPROPRIATE.

(E) WITHIN ONE HUNDRED TWENTY DAYS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE BOARD SHALL HOLD AT LEAST ONE PUBLIC HEARING IN EACH COUNTY AFFECTED BY THE PROGRAM REQUIRED UNDER DIVISION (C) OF THIS SECTION FOR THE PURPOSE OF OBTAINING PUBLIC INPUT CONCERNING THE PLAN FOR IMPLEMENTATION OF THE MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM REQUIRED BY DIVISION (C) OF THIS SECTION. THE BOARD SHALL PROVIDE REASONABLE PUBLIC NOTICE OF THE HEARINGS. THE BOARD SHALL HEAR AND CONSIDER RELE-

VANT PUBLIC COMMENTS, INCLUDING COMMENTS CONCERNING THE FACTORS SPECIFIED IN DIVISIONS (D)(1) TO (6) OF THIS SECTION. THE PUBLIC COMMENTS SHALL BE TREATED IN THE REPORT REQUIRED BY DIVISION (D) OF THIS SECTION.

(F) THE BOARD SHALL COOPERATE WITH THE JOINT COMMITTEE ON MOTOR VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAMS HEREBY CREATED TO MONITOR THE PROGRESS MADE IN SATISFYING THE REQUIREMENTS OF THIS SECTION AND SHALL ADVISE THE BOARD IN THE DEVELOPMENT OF THE REPORT REQUIRED BY DIVISION (B) OF THIS SECTION. THE COMMITTEE SHALL CONSIST OF THREE MEMBERS OF THE HOUSE OF REPRESENTATIVES AND THREE MEMBERS OF THE SENATE. THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE PRESIDENT OF THE SENATE SHALL EACH APPOINT THE MEMBERS OF THE COMMITTEE FROM HIS HOUSE. NOT MORE THAN TWO MEMBERS FROM EACH HOUSE SHALL BE OF THE SAME POLITICAL PARTY. THE CHAIRMAN OF THE COMMITTEE SHALL BE APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES FROM AMONG THE HOUSE OF REPRESENTATIVES MEMBERS ON THE COMMITTEE AND THE VICE-CHAIRMAN SHALL BE APPOINTED BY THE PRESIDENT OF THE SENATE FROM AMONG THE SENATE MEMBERS OF THE COMMITTEE. THE COMMITTEE SHALL HAVE THE SAME POWERS AS OTHER STANDING OR SELECT COMMITTEES OF THE GENERAL ASSEMBLY.

(G) THE DIRECTOR OF ENVIRONMENTAL PROTECTION SHALL ADOPT RULES, IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE, THAT SHALL BECOME EFFECTIVE ON OR BEFORE DECEMBER 31, 1982 TO IMPLEMENT AND ENFORCE MOTOR VEHICLE INSPECTION AND MAINTENANCE CONSISTENT WITH THE STUDY CONDUCTED UNDER DIVISIONS (A) AND (B) OF THIS SECTION, THE PROGRAM PREPARED AND DEVELOPED UNDER DIVISION (C) OF THIS SECTION AND THE REPORT REQUIRED BY DIVISION (D) OF THIS SECTION. THE HOUSE OF REPRESENTATIVES AND THE SENATE MAY BY JOINT RESOLUTION PROHIBIT IMPLEMENTATION AND ENFORCEMENT OF RULES REQUIRED BY THIS DIVISION.

(H) THE DIRECTOR SHALL NOT ENFORCE THIS ACT IF A COURT OF COMPETENT JURISDICTION ISSUES AN INJUNCTION OR RESTRAINING ORDER AGAINST THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PROHIBIT THE IMPOSITION OF ANY SANCTIONS AGAINST THE STATE OF OHIO FOR FAILURE TO COMPLY WITH THE "CLEAN AIR ACT AMENDMENTS OF 1977," 91 STAT. 712, 42 U.S.C. 7401, UNTIL THE INJUNCTION OR RESTRAINING ORDER IS RESCINDED.

(1) THE ATTORNEY GENERAL SHALL BRING A CIVIL ACTION AGAINST THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO CHALLENGE THE DENIAL OF STATIONARY SOURCE POLLUTION PERMITS AND THE WITHHOLDING OF FEDERAL FUNDS

BECAUSE OF THE LACK OF AN APPROVED STATE AUTO EMISSIONS INSPECTION PROGRAM.

(2) THE ATTORNEY GENERAL SHALL SEEK AN IMMEDIATE INJUNCTION TO END THE CURRENT SANCTIONS PENDING THE OUTCOME OF THE SUIT FILED PURSUANT TO THIS DIVISION.

(I) THE ENVIRONMENTAL PROTECTION AGENCY SHALL PROVIDE WHATEVER OFFICE SPACE, SUPPLIES, PERSONNEL, AND ASSISTANCE ARE NECESSARY TO CARRY OUT THIS SECTION AND SHALL BEAR THE COST OF ALL ACTIVITIES CONDUCTED BY IT OR BY THE BOARD CREATED UNDER DIVISION (A) OF THIS SECTION THAT ARE NECESSARY TO CARRY OUT THIS SECTION.

SECTION 2. The General Assembly recognizes both the importance and historical effectiveness of this state's efforts to control air pollution in order to protect the public health and improve air quality. It further recognizes the impact of the 1970 Federal Clean Air Act and subsequent amendments on the state of Ohio. The General Assembly believes that in passing the Clean Air Act, the United States Congress intended that the national air quality standards promulgated thereunder by the United States Environmental Protection Agency be both reasonable and attainable.

It is hereby declared the public policy of the state of Ohio that the state in cooperation with the federal government should determine the appropriate environmental controls to be applied within its boundaries necessary to protect the public health and improve air quality. The state of Ohio should continue to question

and challenge federal air quality regulations and programs that establish unreasonable and unattainable standards, particularly when the programs are of doubtful scientific benefit and are established with no consideration of regional differences among the states. The Ohio Environmental Protection Agency should undertake to conduct studies and projects necessary to prove the need for air quality programs and control measures that will have major impact on the state of Ohio.

SECTION 3. If the Administrator of the United States Environmental Protection Agency, pursuant to Section 110 of the Clean Air Act, disapproves the provisions of this act, the Director of Environmental Protection and the Board created in Section 1 of this act shall be relieved of all obligation and duty to comply with the provisions of this act. If the Administrator has not proposed approval of the provisions of this act within sixty days of formal submission pursuant to Section 110 of the Clean Air Act, the Director of Environmental Protection and the Board created in Section 1 of this act shall be relieved of all obligation and duty to comply with the provisions of Section 1 of this act until such approval is given.

SECTION 4. It is the intent of the General Assembly that all state departments and divisions thereof, including counties and local governments, shall cooperate to the fullest extent possible to aid the Director of Environmental Protection and the Board created in Section 1 of this act in the completion of their responsibilities under Section 1 of this act.

No. 80-1289

APR 3 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

OHIO DEPARTMENT OF HIGHWAY SAFETY and DONALD D. COOK, DIRECTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency constitutionally may prohibit the State of Ohio from registering motor vehicles that do not pass an existing annual emission control inspection.

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p. 30504	14
p. 30506	14
45 Fed. Reg. 73972 (1980)	10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1289

OHIO DEPARTMENT OF HIGHWAY SAFETY and DONALD D. COOK, DIRECTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 635 F.2d 1195. The opinion of the district court (Pet. App. A26-A35) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1980. The petition for a writ of cer-

tiorari was filed on January 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

A. The Statutory Scheme

The Clean Air Act, 42 U.S.C. 1857 *et seq.* (the Act),[1] requires the reduction of pollutants in the ambient air in order "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. (Supp. III) 7401(b)(1).

The Administrator of the Environmental Protection Agency (EPA) must establish standards governing maximum concentrations of particular pollutants in the air (42 U.S.C. (Supp. III) 7409),[2] but the Act gives state and local governments the primary responsibility for establishing and implementing air

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[1] The Act was substantially amended and transferred to 42 U.S.C. (Supp. III) 7401 *et seq.* by the Clean Air Act Amendments of 1977, see, *infra*, pages 9-10. For the sake of clarity, citations are to the Act as amended in 1977, except where there are significant differences in the Act in effect when the case was decided; the changes are identified.

[2] This case involves only the national primary air quality standards, "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health." 42 U.S.C. (Supp. III) 7409(b)(1). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator * * * is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [each] air pollutant [for which criteria have been established] in the ambient air." 42 U.S.C. (Supp. III) 7409(b)(2).

quality control programs (42 U.S.C. (Supp. III) 7410). The Act requires each state to submit to the Administrator plans for "implementation, maintenance, and enforcement" of the national standards for every portion of the state within nine months after the Administrator promulgates those standards. 42 U.S.C. (Supp. III) 7410(a)(1).

These state plans must provide a regulatory scheme for controlling emissions from stationary and moving sources of pollution to the extent necessary to attain the national standards within each of the state's air quality control regions (42 U.S.C. (Supp. III) 7410 (a)(1). Within four months after its submission, the Administrator must approve the state's implementation plan if it satisfies the statutory criteria; if it does not, he must promulgate a substitute plan for the state that does satisfy those criteria. 42 U.S.C. (Supp. III) 7410(a)(2) and (c). See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64-67 (1975).

The statute specifically defines the criteria for a satisfactory implementation plan, which must provide a regulatory scheme for controlling emissions from both stationary facilities and motor vehicles to the extent necessary to attain the national ambient air quality standards within the state within 3 years of the plan's federal approval or promulgation. 42 U.S.C. 1857c-5(a)(2)(A)(i).[3] Each plan must include emission limitations for pollution sources, schedules for compliance, and provisions for such additional methods of pollution control as may be necessary. In particular, the Act specifically provides that an implementation plan must include, if necessary

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[3] The 1977 Amendments permit an extension of this deadline under certain circumstances. 42 U.S.C. (Supp. III) 7410(a)(2)(A); see, *infra*, pages 9-10.

to insure attainment and maintenance of the national standards, motor vehicle emission control inspection and maintenance programs. 42 U.S.C. (Supp. III) 7410(a)(2)(B) and (G).[4]

Enforcement of the state implementation plan is a federal, as well as a state, responsibility. The authorization for federal enforcement is contained in 42 U.S.C. (Supp. III) 7413. Subsection (a)(1) authorizes the Administrator to issue a notice of violation to "any person * * * in violation of any requirement of an applicable implementation plan."[5] If the violation continues for another 30 days, the Administrator is authorized to issue an "order requiring such person to comply with the requirements of such plan" or he may proceed under 42 U.S.C. (Supp. III) 7413(b). Subsection (a)(2) addresses situations where there are widespread violations of an implementation plan that appear to result from a state's failure to enforce the plan effectively. If the Administrator finds such a failure, he may notify the state and, if the situation is not corrected within 30 days, issue a public notice and assume primary federal enforcement. In periods of federally assumed enforcement, the Administrator may issue compliance orders or proceed under 42 U.S.C. (Supp. III) 7413(b)

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[4] An inspection and maintenance program checks pollution emission levels of motor vehicles, and requires those with excessive emissions to be adjusted. A continuing inspection program is important, because the efficiency of a vehicle's emission control system will decrease with the passage of time if it is not properly maintained and repaired. The program identifies vehicles in need of emission control system adjustment and repair.

[5] The term " 'person' " includes a "State, municipality, [or] political subdivision of a State * * *" (42 U.S.C. (Supp. III) 7602(e)).

without prior 30-day notice to the person in violation or to the state.

42 U.S.C. (Supp. III) 7413(b) authorizes the Administrator to commence a civil action for injunctive relief or for recovery of civil penalties. A civil action is authorized whenever a person refuses to comply with an order, continues to violate any requirement of an implementation plan for more than 30 days after notification, or violates a requirement of an implementation plan during a period of federal enforcement under 42 U.S.C. (Supp. III) 7413(a)(2).

B. Factual Background

In 1973, the State of Ohio submitted to the EPA transportation control plans for three air quality control regions: Toledo, Dayton and Cincinnati.[6] The

[6] In 1973, acting pursuant to a court order in *Natural Resources Defense Council, Inc.* v. *EPA*, 475 F.2d 968 (D.C. Cir.), the Administrator required states needing transportation control plans to amend their implementation plans to include such plans. 38 Fed. Reg. 2194, 10851 (1973). Several states failed to amend their plans, and the Administrator promulgated federal transportation control plans for those states, including inspection and maintenance programs for motor vehicles; he ordered the states to implement those plans. Several states successfully challenged EPA's authority under the Clean Air Act and the Constitution to require the states to implement the federally promulgated plans. *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) (*Brown I*); *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975); but see *Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974). The cases holding the Administrator to be without his asserted authority were vacated and remanded by this Court as moot after the government conceded that the proposed federal plans would have to be modified to eliminate the requirement that the state submit legally adopted regulations to the Adminis-

Administrator approved the plans for Dayton and Toledo, 38 Fed. Reg. 30971-30972 (1973), but found the third plan inadequate to assure attainment of the primary standard for photochemical oxidants (ozone) in the Cincinnati area. 38 Fed. Reg. 30972-30974 (1973). The Administrator then promulgated an inspection and maintenance regulation for the Cincinnati region pursuant to 42 U.S.C. (Supp. III) 7410(c), to supplement the state plan. 38 Fed. Reg. 30974 (1973), 40 C.F.R. 52.1878 (hereinafter Cincinnati Regulation).[7]

The Cincinnati Regulation calls for an inspection and maintenance program for light-duty motor vehicles owned and operated within Hamilton County, Ohio, which includes the City of Cincinnati. It requires the County and City to adopt an inspection and maintenance program providing for yearly emissions testing of vehicles. The regulation bars the operation after December 31, 1975, of motor vehicles that have failed to pass the emission test, 40 C.F.R. 52.1878(f), and prohibits the City, the County and the State of Ohio from allowing the registration of such motor vehicles or allowing the operation of these vehicles on public roads or streets under their control. 40 C.F.R. 52.1878(e).[8] No one sought judicial review of the Administrator's promulgation of this

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trator. *EPA* v. *Brown*, 431 U.S. 99, 103 (1977). Thereafter, the Ninth Circuit considered an amended federally promulgated California transportation control plan. *Brown* v. *EPA*, 566 F.2d 665 (1977) (*Brown II*). See discussion, *infra*, pages 13-14.

[7] This inspection and maintenance regulation is the only EPA promulgated transportation control measure for the State of Ohio. See 42 U.S.C. (Supp. III) 7410(c).

[8] This provision is the only major provision of the Cincinnati Regulation that addresses the conduct of, or imposes a duty on, the State of Ohio.

regulation (42 U.S.C. (Supp. III) 7607(b)(1)); the County of Hamilton and the City of Cincinnati implemented an inspection and maintenance program. Both Cincinnati and the neighboring town of Norwood established and operated inspection facilities; vehicles of county residents were required to be inspected at these facilities.[9] The State of Ohio, however, failed to comply with the registration ban. Instead, the Ohio Department of Highway Safety has continued to register motor vehicles without requiring any showing that their emission control systems have passed the inspection required by the Cincinnati Regulation.[10]

On March 15, 1976, the EPA Regional Administrator issued a notice of violation to the State of Ohio, pursuant to 42 U.S.C. (Supp. III) 7413(a)(1). The notice informed the Department of Highway Safety that its action in continuing to register noncomplying motor vehicles was in violation of 40 C.F.R. 52.1878 and, hence, the state implementation plan. A conference with representatives of the EPA in May 1976

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[9] Emissions inspection equipment was installed at preexisting motor vehicle safety inspection facilities at these locations. The Cincinnati facility, which performed almost 60% of the inspections, was permanently closed by a February 11, 1981, ordinance of the City Council (App., *infra*, 1a-2a). The fate of the Norwood facility is unclear; it is currently funded only through March 31, 1981.

[10] The Ohio Department of Highway Safety is the state agency responsible for administration of laws relating to the registration and licensing of motor vehicles. Ohio Rev. Code Ann. § 4501.02 (Page Supp. 1979). Under Ohio law, annual registration is required for motor vehicles "operated or driven upon the public roads or highways." Ohio Rev. Code Ann. § 4503.10 (Page Supp. 1979). An annual license tax is also levied upon the operation of motor vehicles at the time of making application for registration. Ohio Rev. Code Ann. § 4503.02 (Page Supp. 1979).

failed to persuade the Ohio Department of Highway Safety to comply with the registration ban. Therefore, on June 22, 1976, the EPA Regional Administrator issued an order to the State of Ohio pursuant to 42 U.S.C. (Supp. III) 7413(a)(1). This order directed the State to refuse to issue license plates to any light-duty, spark-ignition powered motor vehicle owned by a resident of the County or City unless the vehicle had been certified, following an inspection made within the preceding 12 months, as being within established emissions standards. The State refused to comply with this order.

On November 18, 1976, the United States brought suit pursuant to 42 U.S.C. (Supp. III) 7413(b)(1) seeking an injunction to enforce the June 22, 1976, order.

C. The Decisions Below

Despite the State's contrary claim, the district court ruled that the prohibition against vehicle registration in the Cincinnati Regulation was intended to apply to the Ohio Department of Highway Safety (Pet. App. A29). It also ruled, however, that 42 U.S.C. (Supp. III) 7413(a)(1) does not authorize the EPA to issue a compliance order directing a state to take enforcement action contained in a federally promulgated regulation. Instead, it concluded that the sole remedy for nonenforcement by a state under the Act is the assumption of primary federal enforcement under 42 U.S.C. (Supp. III) 7413(a)(2).

On appeal, a divided court of appeals reversed. The court ruled that a state is a "person" subject to the enforcement procedure of 42 U.S.C. (Supp. III) 7413 (a)(1). Ohio's ownership and control of streets and highways, coupled with the historic practice of licensing vehicles "provide a completely rational basis for

placing upon the State the obligation to prevent use of these facilities by noncomplying vehicles" (Pet. App. A19).

Moreover, enforcement of this obligation does not unconstitutionally interfere with integral governmental functions or impair the integrity of the state or its ability to function in the federal system. See *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976); *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975). The Cincinnati Regulation "does not require the State to adopt legislation, establish new regulatory agencies or change its procedures for registering vehicles. It merely requires the State to deny use of state-owned facilities to those whose use adds to the national problem of pollution. Further it does not appear that compliance will entail large expenditures by the State" (Pet. App. A20-A21).

D. Subsequent Developments

While this litigation was pending in the lower courts, Congress enacted the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.* These amendments call for revisions in state implementation plans that will affect the Cincinnati Regulation. The amendments provide for the designation of nonattainment areas for particular pollutants. 42 U.S.C. (Supp. III) 7407(d). State implementation plans must bar new stationary sources in nonattainment areas after June 30, 1979, unless the plan complies with special nonattainment area provisions. 42 U.S.C. (Supp. III) 7410(a)(2)(I). These nonattainment area provisions require an implementation plan to provide for attainment of national primary ambient air standards by December 31, 1982. In the case of photochemical oxidants or carbon monoxide

(the pollutants associated with emissions from motor vehicles), attainment may be extended to not later than December 31, 1987, if the state demonstrates to the Administrator that attainment is not possible by the 1982 date despite the implementation of "all reasonably available measures." 42 U.S.C. (Supp. III) 7502(a). In that situation, the implementation plan provisions must "establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program[,] and identify other measures necessary * * *." 42 U.S.C. (Supp. III) 7502(b)(11)(B) and (C). Submission of implementation plan revisions which meet the nonattainment provision requirements was required by January 1, 1979. 42 U.S.C. (Supp. III) 7502 note. Where an inspection and maintenance program is needed, and reasonable efforts to submit such a revised state implementation plan have not been made, EPA "shall not approve" grants otherwise authorized by the Clean Air Act and the Secretary of Transportation shall not award certain highway grants. 42 U.S.C. (Supp. III) 7506(a). See *Pacific Legal Foundation* v. *Costle*, 627 F.2d 917 (9th Cir. 1980), cert. denied, No. 80-828 (Feb. 23, 1981).

The Cincinnati area is one of two regions in the State of Ohio that require vehicle inspection and maintenance programs under the 1977 Amendments (45 Fed. Reg. 73972 (1980)). On August 13, 1980, after oral argument of the present case in the court of appeals, the State of Ohio adopted legislation requiring study and implementation of an inspection and maintenance program by December 31, 1982; it revised its implementation plan to reflect this new policy.[11] On November 7, 1980, the EPA published

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[11] As a result of this legislation, the government offered to dismiss the appeal in the instant case. It concluded that there

a notice that it was considering conditional approval of the revised Ohio implementation plan. 45 Fed. Reg. 73972 (1980).

ARGUMENT

1. The present enforcement action has been overtaken by events. Its outcome is not likely to influence enforcement of the Clean Air Act because the 1977 Amendments to the Act, have significantly changed that law. The resolution of the action, moreover, is unlikely to have a significant impact even in Ohio, because the abandonment of the Cincinnati inspection program has substantially changed the factual basis on which the decisions below rested. As a result, this case is not an appropriate vehicle for the resolution of questions concerning the scope of the Administrator's authority to compel implementation of transportation control plans by the states. Cf. *EPA* v. *Brown*, 431 U.S. 99 (1977).

The Cincinnati Regulation, which limited the State's duty to a registration ban, is unique among the transportation control plans promulgated in 1973. Future inspection and maintenance programs, including registration bans, will be created under the terms of the 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 *et seq.* Although these amendments still contemplate that a state will implement and enforce an inspection and maintenance program for motor vehicles under certain circumstances

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was no further need to press for enforcement of the June 1976 EPA order, because the state legislation contemplates a state sponsored inspection and maintenance program by December 31, 1982, and noncomplying vehicles will thereafter be prohibited from operating on public roads. The State of Ohio opposed the government's motion to dismiss and the court of appeals denied the motion.

(42 U.S.C. (Supp. III) 7502(b)(11)(B) and (C)), the new amendments provide for methods to induce the states to create such programs, without relying on direct judicial action. See *Pacific Legal Foundation* v. *Costle*, 627 F. 2d 917 (9th Cir. 1980), cert. denied, No. 80-828 (Feb. 23, 1981). Because these inducements are likely to be successful, an enforcement action similar to the present one is unlikely under the 1977 Amendments.

Indeed, the State of Ohio has responded to the 1977 Amendments by enacting legislation authorizing the implementation of an inspection and maintenance program by December 31, 1982 (Pet. App. A122-A130). EPA expects that this state program will fulfill the goal of this enforcement action: to have an effective inspection and maintenance program in Hamilton County, Ohio. For this reason, the government explored the possibility of dismissing this action following enactment of the state statute. The court of appeals instead reversed the judgment of the district court and remanded the case for further proceedings (Pet. App. A23). Upon remand, the district court is likely to tailor any relief against the State of Ohio to take into account the new Ohio statute, to minimize inter-governmental conflict, and to foster cooperation to ensure the successful development and implementation of an inspection and maintenance program for the State of Ohio by December 31, 1982.

Moreover, in fashioning a remedy the district court will have to consider the effect of the abandonment of some or all of the municipal inspection facilities (see note 9, *supra*). This enforcement action has been litigated from the outset on the factual premise that those facilities were available to inspect motor vehicles of Hamilton County residents. The failure

of this factual predicate, while not curing the long-standing violation of the State of Ohio, may render effective relief under this enforcement action impractical.[12] The County and cities are not parties to the present action and their rights and duties under the Cincinnati Regulation, the Clean Air Act and the Constitution have not been addressed. For this reason, the relief requested in this action—compliance with the registration ban—may not be effective unless and until action is taken, beyond the confines of this case, to reinstitute inspection programs in Hamilton County.

2. Contrary to petitioners' assertions (Pet. 7-8), the court of appeals decision in this case does not conflict with the decision in *Brown II*. *Brown II* was the final decision in a series of cases which challenged the EPA's promulgation of transportation control plans for several states in 1973. *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) (*Brown I*); *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975).[13] The regulations at issue in those cases directed the states to implement a wide variety of transportation control measures in addition to the inspection and maintenance programs, including a carpool matching system, *Brown I*, *supra*, 521 F.2d at 830, and development of bicycle lanes, *District of Columbia* v. *Train*, *supra*, 521 F.2d at 979. These cases

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[12] Even if the Norwood facility is not closed, it is not likely to be adequate to inspect all the vehicles covered by the plan.

[13] See *Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974); see generally *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974).

were vacated and remanded by this Court as moot after EPA conceded that the federal regulations had to be modified to remove the requirement that the states submit legally adopted regulations. *EPA* v. *Brown, supra.*

The Administrator then promulgated a revised inspection and maintenance regulation for California. 42 Fed. Reg. 30504 (1977). This regulation required the state to create an inspection system, provide for reinspection of failed vehicles, supervise repair facilities, and refuse to register motor vehicles that failed to comply with the program. *Id.* at 30506. Although the court in *Brown II* held that the regulation exceeded the Administrator's authority under the Clean Air Act, it specifically noted that a simple registration ban of the kind at issue here "quite plausibly resembles legitimate steps by the federal government to prevent interference with its regulation of pollution. It merely requires the state to proceed in a certain manner if it is to regulate this aspect of commerce at all" (566 F. 2d at 673). Accord, *District of Columbia* v. *Train, supra*, 521 F. 2d at 987, 991, vacated and remanded on other grounds, *EPA* v. *Brown, supra*; cf. *Maryland* v. *EPA, supra*, 530 F. 2d at 226 (affirming federal power to condition ongoing state activities, such as vehicle licensing).

Petitioners emphasize (Pet. 12) that *Brown II* and *District of Columbia* contemplated a federally run inspection and maintenance program as the basis for the registration ban. But the operation of the inspection and maintenance program by the City rather than the federal government adds no new element to the analysis of the validity of the registration ban. Like a federally run program, the program in this case is an externally managed, valid inspection program not requiring any state involvement in its op-

eration.[14] Petitioners are also incorrect in suggesting (Pet. 11-13) that the legal theory underlying the judgment below is inconsistent with *Brown II* and *District of Columbia, supra.* None of these courts relied on the argument that the state could itself be considered a polluter by virtue of its ownership of the streets and highways. Compare *Brown II, supra,* 566 F. 2d at 673; *District of Columbia* v. *Train, supra,* 521 F. 2d at 991; Pet. App. A19. The decisions recognize that state power over access to its roads has never been immune from federal regulation under the Commerce Clause (see National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392(d) (preempting state power over motor vehicle safety requirements); *South Carolina Highway Department* v. *Barnwell Bros., Inc.,* 303 U.S. 177, 189-190 (1938)), nor from the constitutional prohibition implicit in the Commerce Clause. *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 529 (1959). Indeed, regulation of traffic on state-owned roads and highways has long been a cooperative effort among federal, state and local governments. *Friends of the Earth* v. *Carey,* 552

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[14] Petitioners' claim that the decision below is inconsistent with the decisions of other circuits because it requires the State to "revoke license plates" without state legislative authority (Pet. 15) is based on an incorrect premise. Neither the Cincinnati Regulation nor the EPA compliance order of June 22, 1976, requires the State to "revoke" license plates. Rather, they simply require the State to refrain from taking affirmative action—issuing a new or renewed license—for nonconforming vehicles. This is precisely the kind of registration ban approved in *Brown II* and *District of Columbia, supra.*

F.2d 25, 38 (2d Cir.), cert. denied, 434 U.S. 902 (1977).[15] Such joint regulation, which imposes only minimal burdens on the state, does not raise issues regarding state autonomy of the sort that concerned the Court in *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852.

In sum, the decision below represents an application of existing principles to the very narrow factual circumstances presented by the registration ban provision in the Cincinnati Regulation. Further review is not warranted.

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[15] The court of appeals also held petitioners' Fifth Amendment and Guaranty Clause (U.S. Const. art. IV, § 4) claims to be without merit. These ruling are correct. *Baker* v. *Carr*, 369 U.S. 186, 224 (1962); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). See *South Terminal Corp.* v. *EPA*, *supra*, 504 F.2d at 673.

Finally, petitioners' claims concerning the ambiguity in the regulation raise no substantial issue. Both lower courts found the Cincinnati Regulation clearly placed an obligation on the State of Ohio to deny registration to noncomplying motor vehicles (Pet. App. A22, A29). No further consideration of this fact bound question is necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

APPENDIX

PSO

EMERGENCY

CITY OF CINCINNATI

W.P.H.

AN ORDINANCE NO. 45-1981

Modifying the provisions of the Cincinnati Municipal Code by repealing Chapter 504, "Testing Stations" and all the sections enumerated therein.

WHEREAS, by Ordinance No. 231-1980 council repealed the sections of Chapter 504 dealing with auto safety inspections because the costs incurred in operating the Safety Lane, including proposed capital costs for revitalizing the existing equipment, exceeded the operational revenues, thereby deleting the safety inspection and retaining only the auto emissions inspection; and

WHEREAS, said ordinance provided for the complete closing of the Safety Lane, including the auto inspection program, effective December 31, 1982, the date by which statewide auto emissions testing was to commence; and

WHEREAS, despite efforts to adjust the fees for the remaining auto emissions testing to be commensurate with the operational expenses, the Safety Lane is operating at a projected deficit and is no longer feasible to operate; now, therefore,

BE IT ORDAINED by the council of the city of Cincinnati, state of Ohio:

Section 1. Chapter 504 of the Cincinnati Municipal Code entitled "Testing Stations" and all of the sections enumerated therein is hereby repealed.

Section 2. This ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace, health, safety and general welfare, and shall go into effect forthwith. The reason for the emergency is the immediate avoidance of additional financial losses arising out of the operation of the Safety Lane.

Passed February 11 A.D., 1981

/s/ David Mann
Mayor

Attest: /s/ Webster W. Posey
Clerk

I Hereby Certify That Ordinance No. 45-1981 was Published in the City of Cinn. in Accordance With the Charter of 2/24/81.

/s/ Webster W. Posey
Clerk of Council

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